IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

No. 79-573

RICHARD KAVNER,
Petitioner,

v.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION, LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST, PHILIP L. GOODWILLING, LEVI SANFORD, ERNST NEIDEL, PAUL AKERS, RONALD GAMACHE MICHAEL DUNN, KENNETH CARROLL, JAMES JOINER, CHICK THORNTON and JOHN BECKER.

Defendants.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

Table of Authorities

Cases Cited:

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Petitioner Richard Kavner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, No. 78-1638.

OPINION BELOW

The opinion of the District Court (Wangelin, J.) is not reported and is reprinted herein as Appendix A. The opinion of the Court of Appeals is not yet reported and is reprinted herein as Appendix B.

JURISDICTION

The opinion of the Court of Appeals was filed on June 1, 1979. Petitioner's timely petition for rehearing or transfer en banc was denied July 9, 1979. This petition for certiorari was filed within ninety days of July 9, 1979. The court's jurisdiction is invoked under 28 U.S.C. §1254(1).

PRELIMINARY STATEMENT

For over 25 years, Petitioner was the "top assistant" to Harold Gibbons, the chief executive of Teamsters Local 688. In January 1972, Petitioner applied for a pension from the Teamsters Local 688 Employees Pension Plan. Of the three Trustees of the Plan, the two who were eligible to vote thereon approved Petitioner's application.[1]

Prior to Petitioner's retirement, the Trustees had entered into a contract with Defendant Occidental Life Insurance Company whereby Occidental agreed to "provide and guarantee" pensions for 688 employees. For purposes of this guarantee, the parties agreed upon the number of years of past credited service each employee had earned. After retirement, Petitioner began receiving his pension from Occidental.

In 1973, Gibbons was forced to resign.

In 1975, Occidental notified Petitioner that his pension was being taken away because he "never met the eligibility requirements." Petitioner was never offered a hearing as to his eligibility.

The Trustees serve at the pleasure of the head of the local union. The only Defendant-Trustee to testify at the trial stated that he took away Petitioner's pension because Petitioner had a "break in service" while on assignment to the International from 1958-63, and did not have a written "leave of absence" from Gibbons with regard thereto.

Gibbons and Kavner testified that, in 1958, Gibbons orally granted Kavner a "leave of absence" for his assignment to the

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[1]Petitioner, who was the third Trustee, properly abstained from voting on his own application.

International. The trial judge believed their testimony. It was not disputed that Gibbons had authority to grant such a leave.

The Pension Plan, which required a written leave of absence, was not adopted until 1968.

Petitioner's assignment to the International from 1958-63 was well known to the Trustees when they approved his pension in 1972.

The service credited to Petitioner by the Trustees and Occidental in their contract included the years 1958-63.

The District Court found that Petitioner had not suffered a break in service and ordered his pension restored; a panel of the Court of Appeals found this to be "clearly erroneous," and reversed outright.

QUESTIONS PRESENTED

1. Whether the conduct of a new set of Trustees of the union pension plan in cutting off petitioner's monthly pension payments, on grounds other than fraud, three years after his retirement, is contrary to established principles of law, and particularly to the law of the State of Missouri, when the pension had been properly authorized by predecessor trustees?

2. Whether the opinion of the Eighth Circuit Court of Appeals is in conflict with established principles of law in holding:

A. That is was proper for the new trustees to apply retroactively a requirement of the pension plan for written leave of absence to petitioner's oral leave of absence officially granted him, and relied upon by petitioner when he acceded to assignment to the International union, ten years before the plan came into being;

B. That such retroactive application did not constitute an unreasonable discrimination between those employees who did, and those who did not, receive leaves of absence in writing before any pension plan existed;

C. That the Trustees who adopted the pension plan and approved petitioner's pension abused their discretion in determining that the provision of the plan requiring written leave of absence was to be applied prospectively;

D. That such retroactive application permits the new trustees legally to demand re-payment from petitioner of the pension he has received?

3. Whether the opinion of the Eighth Circuit Court of Appeals is contrary to established principles of law, and particularly to the law of the State of Missouri, in relieving Occidental of its contractual acceptance of petitioner's years of service and guarantee of his pension based on those years of service, without petitioner's consent?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATINS

None.

STATEMENT OF THE CASE

The Factual Background

In 1968, Teamsters' Local 688 established a pension plan for its employees. One of the Plan's eligibility requirements was twenty years of "credited service" (Pl. Exh. [2]).

On March 15, 1971, the Trustees of that plan signed a contract with defendant Occidental whereby the Trustees agreed to forward all of Local 688's contributions to Occidental, and Occidental agreed to pay benefits due under the plan (Find. Fact 1, App. 20 [3]). In this contract, the Trustees and Occidental agreed "that the information and data contained in Exhibit B as such Exhibit appears at the Contract Date, shall be binding and conclusive" (App. 449). Exhibit B credited Petitioner with over twenty years of service with Local 688 [4] (App. 457).

Petitioner retired on January 1, 1972 (Find. Fact 2, App. 20). At the time of his retirement, he was one of three Trustees of the pension plan. Shortly before his retirement, his application for a pension was approved in writing by Trustee-Defendant Goodwilling and the third Trustee (Pl. Exh. 24 [Appendix C hereto], App. 471-72). Following his retirement, he began receiving a pension, and continued to do so until May 1975, when he received the following letter from Defendant Occidental:

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[2]Plaintiffs' Exhibit.

[3]Finding of Fact 1, Joint Appendix 20.

[4]A separate issue with regard to Petitioner's starting date is not included in the Questions Presented herein.

> The Contractholder [the Trustees] has now notified Occidental that you were not entitled to receive the annuity payments which Occidental made to you because you never met the eligibility requirements specified in the Plan. Further, the Contractholder has directed us to advise you that no more annuity payments will be made you under the Contract.
>
> "Additionally, the Contractholder has directed us to make demand upon you to repay all of the annuity payments that we have made to you under the Contract. Please make such repayment in the amount of $49,200 directly to the Trustees of the LHI-688 Employees Retirement and Pension Plan Trust."

(Pl. Exh. 8, App. 461).

Petitioner never received any communication from the Trustees. No hearing was ever offered or held (App. 371).

In 1976, Petitioner filed this suit against the Trustees, the members of Local 688, and Occidental. In the Trustees' answer, Petitioner learned for the first time that the Trustees were contending that he had suffered a "break in service" while on temporary assignment to the International Headquarters in Washington.

In 1958, Harold Gibbons, the Secretary-Treasurer and head of Local 688, and James Hoffa, the International President, assigned Petitioner to Washington for temporary duty with the International (App. 42, 148). The testimony of both Petitioner and Gibbons that Petitioner asked for and received an oral leave of absence from Gibbons was undisputed, and was accepted by the District Court (Find. Fact 10; App. 23, 42, 147-48). In fact, Gibbons testified that:

> "When he was sent I wanted him to come back or else I never would have assigned him, . . .Developing leadership

> under any situation is difficult at best. When you have a good man you don't let him go."

(App. 148). Even the defendants admitted that Gibbons had the authority to grant a leave of absence (App. 407).

At the time Petitioner was granted an oral leave of absence there was no pension plan, and the validity of an oral leave of absence had never been questioned.

Petitioner testified that, while on assignment to the International, he did work for Local 688: "I would be in a lot of times Monday and Friday and not full days. I would do a lot of weekend work. . . . [I]t was just a continuous thing" (App. 43). Gibbons also testified to Petitioner's work for the local while he was on assignment to the International:

> "[H]e was working on 688 business while he was in the City of St. Louis, which could have been two or three days a week or less maybe, but he was also working on St. Louis business when he would be in Dubuque, Iowa or as long as wherever he's at the end of a telephone. He was constantly being consulted on problems facing St. Louis. He was taking assignments from myself or helping some staff member who needed to put up a picket line in Louisville, Kentucky or things of that sort . . . . I know that Dick Kavner put in many, many hours . . . in the cause of 688."

(App. 159-60).

In a letter written to Local 688's attorney in 1967 concerning Petitioner's services to the local while with the International, the Comptroller of the local stated that Petitioner:

> "1. Supervised all negotiations and personally handled all serious negotiations; handled membership meetings; consulted with officers and business agents by phone and met with them out of town on local union problems.

"2. Approximately 1500 hours each year was devoted to Local 688 business."

(Pl. Exh. 32, App. 474).

The trial court believed the testimony of Petitioner and Gibbons: "While Kavner was on assignment to the International he performed substantial services for Local 688" (Find. Fact 10, App. 23).

Gibbons also testified that Petitioner's work with the International Union of Teamsters" was "[a] great value to our organization" (Local 688) (App. 149). The trial judge also believed Gibbons' testimony on this subject: "Kavner['s] . . . . service to the International was of value to Local 688" (Find. Fact 10, App. 23).

During the years 1958-63, Petitioner continued to pay his dues to the local, and 688 maintained a "key man" policy on Petitioner's life (App. 347, 373).

Defendant-Trustee Goodwilling was employed by Local 688 during the time Petitioner was on assignment to the International, and was very much aware of the assignment when he signed the contract with Occidental in 1971 which credited Petitioner with service for this period, and when he approved Petitioner's pension in 1972 (App. 315, 387-88). In fact, Goodwilling himself prepared a document in 1970 which included credit for these years (App. 349-50; A.O.O. Exh. [5] RR).

After Gibbons was forced out by Gamache, who succeeded him, Goodwilling "determined," for the first time, that the requirement in the plan that a leave of absence be in writing should have retroactive application to leaves granted before the plan was in existence. He admitted that Gamache could fire him without cause but claimed his new interpretation was independently arrived at by him (App. 355).

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[5]Exhibit of Appellants Other than Occidental.

The trial judge made a specific finding that he did not believe Goodwilling (App. 23).

The Procedural Background

Petitioner filed his suit in the Circuit Court for the City of St. Louis, State of Missouri, alleging both a comon-law count under state law and a count under ERISA (Employees Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.*). The Petition was removed by defendants on the basis of the ERISA count. The trial court's decision was not based upon ERISA, and no issue is raised with regard to that act herein.

The District Court found that the Trustees and the members of the local union had breached their contracts with Petitioner, and that Defendant Occidental was guilty of breach of contract, breach of fiduciary duty, actuarial malpractice, and fraud. In so ruling, the trial court made a specific finding that Petitioner "did not have a 'break in service' from 1958 through 1963 as that term is used in the" pension plan (Find. Fact 10, App. 23).

The Court of Appeals held that this finding was "clearly erroneous" and reversed the judgment (S1. Opin.[6] 31-33). Defendants are now seeking judgment in the District Court for $70,000 on their Counterclaim.

REASONS FOR GRANTING THE WRIT

I

The Conduct Of A New Set Of Trustees Of The Union Pension Plan In Cutting Off Petitioner's Monthly Pension Payments, On Grounds Other Than Fraud, Three Years After His Retirement, Was Contrary To Established Principles Of Law, And Particularly To The Law Of The State Of Missouri, When The Pension Had Been Properly Authorized By Predecessor Trustees.

Petitioner retired in 1972 and began receiving his pension. Over three years later, without notice, hearing, or explanation, it was cut off. Only after he filed suit did he learn that the Trustees contended that he had suffered a "break in service" while on assignment to the International because the leave of absence granted to him by his employer had not been reduced to writing. The Trustees who approved his pension had been well aware of his assignment to the International, and had raised no question as to his eligibility.

Petitioner's assignment to the International, and oral leave of absence with regard thereto, occurred in 1958, when there was no pension plan and no requirement that a leave of absence had to be in writing. The pension plan was not written until 10 years after. However, defendants interpreted the provision therein requiring written leave of absence to be retroactive. The District Court rejected this interpretation and restored Petitioner's pension. The Court of Appeals held this finding to be "clearly erroneous," and affirmed the Trustees' right retroactively to deprive Petitioner of his pension.

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[6]Slip Opinion.

"Under established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 30 L.Ed.2d 341, 358 N.20 (1971). Missouri law applies to this issue. Under Missouri law, a voluntary, non-contributory private pension plan becomes an enforceable contract if there is "notification to and knowledge of the benefits on the part of the employee and consideration or continuance of employment in reliance upon the plan." *Molumby* v. *Shapleigh Hardware Co.*, 395 S.W.2d 221, 226 (Mo.Ct.App. 1965).

Further, an employee who retires in reliance upon a pension plan has a right to receive the promised benefits. *Feinburg* v. *Pfeiffer Co.*, 322 S.W.2d 163 (Mo.Ct.App. 1959). There is no question that an employee's rights are vested as a matter of law "once he begins to receive benefits thereunder." *Molumby* v. *Shapleigh Hardware Co., supra* at 226.

In their brief in the Eighth Circuit, with regard to a totally different issue than that involved in this petition, defendants in this case themselves set forth the standard for judicial review of the interpretation placed on a pension plan by the Trustees thereof: "The interpretation of Trustees as to the meaning and intent of the Trust Agreement plan documents must be given great weight, absent a showing that the Trustees interpretation is clearly arbitrary, capricious, or unreasonable" (A.O.O. Br.[7] 19). A "long-standing interpretation and practice by the Trustees is to be given substantial if not controlling consideration in any analysis of the intent of the agreement as expressed by the words of the written documents." *Miracle* v. *United Mine Workers,* 373 F. Supp. 603, 604 (D.D.C. 1974).

The difficulty with the position of the Court of Appeals is that it accepted an interpretation of the plan adopted by

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[7]Brief of Appellants other than Occidental in the Eighth Circuit.

Defendant-Trustee Goodwilling in 1975 solely and exclusively for the purpose of depriving this Petitioner of his pension, and ignored the interpretation which had prevailed to that time. In 1970, with full knowledge that Petitioner had been on assignment to the International from 1958-63, Goodwilling himself prepared a list of service dates which credited Petitioner with past service which included the years 1958-63. In 1971, all three Trustees, including Petitioner and Defendant-Trustee Goodwilling, signed a contract with Occidental which included a schedule (Exhibit B) that credited Petitioner with service for those years. In 1972, Defendant-Trustee Goodwilling and Trustee John Naber (not a party to this lawsuit) approved Petitioner's application for a pension, with full knowledge of Petitioner's service to the International. The interpretation of the predecessor Trustees was entitled to at least as much judicial deference as that of Defendant-Trustee Goodwilling in 1975.

Defendant-Trustee Goodwilling tried to cast doubt on the impartiality of his decisions in 1971 and 1972 with testimony that he had voted for Petitioner's pension because he was "afraid of losing" his "job." The trial judge removed any question of the validity of the Trustees' original vote to grant Petitioner a pension with a specific finding that he did not believe the testimony of Defendant Trustee Goodwilling.

The result of the decision of the Court of Appeals simply boils down to this: The Trustees granted Petitioner a pension in 1972 and took it away three years later for no reason other than that they had changed their mind on the interpretation of the plan. Defendants have not cited a single case to either the District Court or the Court of Appeals where such arbitrary and capricious conduct has been approved. The Court of Appeals cited no authority to support this result.

The closest that any pension fund trustees have ever come to taking away a retiree's pension for reasons other than fraud is the situation where such trustees have attempted to change

eligibility rules retroactively after an employee has met all of the eligibility requirements but either has not yet retired, or has not been awarded his pension. In every one of those instances, the courts have held that it was too late to change the rules with regard to such employees. *Norton* v. *I.A.M. National Pension Fund*, 553 F.2d 1356 (D.C.CIR. 1977); *Lavelle* v. *Boyle*, 444 F.2d 910 (D.C. Cir. 1971); *Kosty* v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1962); *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); see *Lee* v. *Nesbitt*, 453 F.2d 1309 (9th Cir. 1972). At the very least, the opinion below is in conflict with these decisions.

The danger of the precedent set by the Court of Appeals opinion is that it turns the power to control the pensions of former officers and employees of labor unions into a tool for revenge in the hands of their successors. There is ample reason in the record to believe that that is exactly what happened here. Harold Gibbons had been the executive head of Local 688, and a powerful figure in the International for 25 years (App. 143). He was deposed ("resigned") and replaced by Defendant Gamache in a "palace revolt" in 1973 (the year after Petitioner retired) (App. 406-407, 420). Petitioner had been Gibbons' "top assistant" (App. 148). It takes no great flight of imagination to appreciate that Gibbons' "successors" do not harbor kind feelings toward his former "top assistant." Whether or not this is true in the instant case, it is unconscionable to place a retired pension beneficiary at the mercy of former political opponents by allowing them to "change the rules" and take away his pension long after he has retired. The Trustees of Local 688's pension plan serve at the pleasure of the head of the union, as do all of the officers and employees (App. 355, 460). The decision of the Eighth Circuit, if allowed to stand, permits and invites union officers to use the pensions of retired union officers and employees as an instrument for political retaliation and retribution. Such a decision must not be permitted to remain on the books.

Although the situation is most likely to arise where the retired pension recipients are former political opponents, the opinion below is obviously not so limited, and actually threatens the stability of all pensions. If a pension is not secure after three years, when is it ever secure? If the opinion below is permitted to stand, no retired pension beneficiary may ever again feel secure that the Trustees who control his pension may not change their mind, or that new trustees will not have a different opinion, with regard to his eligibility, and thereby deprive him thereof.

Thus, with regard to the first question, the writ should be granted because the decision below is contrary to established law regarding pensions, and is in conflict with decisions in other circuits. The question is important because it affects the rights of retired pension beneficiaries everywhere.

II

The Opinion Of The Eighth Circuit Court Of Appeals Is In Conflict With Established Principles Of Law In Holding:

A. That It Was Proper For The New Trustees To Apply Retroactively A Requirement Of The Pension Plan For Written Leave Of Absence To Petitioner's Oral Leave Of Absence Officially Granted Him, And Relied Upon By Petitioner When He Acceded To Assignment To The International Union, Ten Years Before The Plan Came Into Being;

B. That Such Retroactive Application Did Not Constitute An Unreasonable Discrimination Between Those Employees Who Did, And Those Who Did Not, Receive Leave Of Absence In Writing Before Any Pension Plan Existed;

C. That The Trustees Who Adopted The Pension Plan And Approved Petitioner's Pension Abused Their Discretion In Determining That The Provision Of The Plan Requiring Written Leave Of Absence Was To Be Applied Prospectively;

D. That Such Retroactive Application Permits The New Trustees Legally To Demand Re-payment From Petitioner Of The Pension He Has Received.

A. When Petitioner was assigned to the International, he relied upon Gibbon's oral leave of absence for the assurance that he would not lose any 688 benefits by reason of accepting the assignment (App. 42). It is totally arbitrary and capricious to penalize Petitioner because he and Gibbons failed to divine that, ten years later, a pension plan would be adopted requiring written leaves of absence.

The trial judge found that Petitioner had Gibbon's oral grant of leave of absence. Surely, it cannot be gainsaid that it would not have been written if, under the wildest flight of imagination, the failure of Gibbons to write "leave of absence granted" would be the basis of revocation of a vested pension. A plan interpretation which is arbitrary, or capricious, or unreasonable, or adopted in bad faith, or an abuse of discretion, cannot be permitted to stand. *Roark* v. *Boyle,* 439 F.2d 497 (D.C. Cir. 1970); *Roark* v. *Lewis,* 401 F.2d 425 (D.C. Cir. 1968). The opinion below has sanctioned just such an interpretation.

B. Defendant-Trustee Goodwilling's 1975 interpretation that the written leave of absence clause was retroactive means that those employees who were on assignment elsewhere prior to adoption of the plan, and happened to obtain written memorialization of their leaves of absence will receive their pensions, and those similarly situated who were orally accorded such leaves will not. There is simply no rational basis for such discrimination.

C. The trial court upheld the decision of the Trustees who approved Petitioner's pension with full knowledge of his assignment to the International. The Court of Appeals reversed. This can only mean that the Court of Appeals found, without actually saying so, that these Trustees acted arbitrarily and capricously. Significantly, these were the very Trustees who adopted the

plan containing the requirement of written leave. Their interpretation of this provision as being prospective only was certainly entitled to "great weight." Yet, the Court of Appeals afforded it no weight, thereby effectually stripping the original Trustees of their discretionary power to interpret the written leave of absence provision as prospective. On this issue, the Court of Appeals opinion was bereft of authority. In finding that the trial court's approval of the interpretation of the original Trustees was "clearly erroneous," and choosing instead Defendant-Trustee Goodwilling's readings, the Court of Appeals overlooked the political motivation behind the new Trustees' action, ignored the inviolable nature of a pension already awarded, and has thereby made the concept of "vested pension rights" a quicksand for retirees.

D. The Trustees are not satisfied with cutting off Petitioner's pension. They have sought, and are still seeking, to recover all of his pension payments, plus interest. In light of Petitioner's reliance upon Gibbons' oral leave of absence in accepting the assignment to Washington, and his reliance upon the acceptance of his service dates by the first trustees both as to continued employment and retirement, it is simply incredible that he should be called upon to return over three years of pension payments, with interest—further demonstrating the political and retaliatory nature of the action of the second set of Trustees, which has been sanctioned by the Court of Appeals.

III

The Opinion Of The Eighth Circuit Court Of Appeals Is Contrary To Established Principles Of Law, And Particularly To The Law Of The State Of Missouri, In Relieving Occidental Of Its Contractual Acceptance Of Petitioner's Years Of Service And Guarantee Of His Pension Based On Those Years Of Service, Without Petitioner's Consent.

In 1971, the Trustees and Occidental agreed that Petitioner's "credited service" included the years during which he was on

assignment to the International. In reliance upon this agreement, and in expectation of his pension, Petitioner continued to work for the union. In 1972, in reliance upon this contract, and the promises of the Trustees and Occidental that he would receive a pension, Petitioner retired. In 1975, the Trustees repudiated this provision in the contract, and Occidental acceded thereto.

Under Missouri law, Petitioner was a third-party beneficiary to this contract, and was entitled to enforce his rights thereunder, *e.g.*, *Silton* v. *Kansas City*, 446 S.W.2d 129 (Mo. 1969). Missouri law also provides that an employee's pension rights are vested, and unalterable, as a matter of law "once he begins to receive benefits thereunder." *Molumby* v. *Shapleigh Hardware Co.*, *supra* at 226. The District Court found that, by cancelling Petitioner's pension, the Trustees and Occidental breached his rights as a third-party beneficiary to the contract. The Court of Appeals held that, even though three years had elapsed since Petitioner's retirement, the Trustees and Occidental had the right to alter the contract and withdraw credit from Petitioner for the years that he was assigned to the International.

The ruling of the Court of Appeals is clearly contrary to the applicable state law. Petitioner filed his lawsuit in the state courts. It is clear that these courts would have enforced the contract. The case was removed by the defendants. The purpose of the removal provisions is not to produce a different result—yet, that is precisely what happened here. The Court of Appeals decision is directly contrary to applicable state law.

CONCLUSION

When Petitioner retired, the Trustees and Occidental approved his pension with full knowledge of the facts concerning his temporary assignment to the International Union. Three years later, a second set of Trustees overruled their predecessors and revoked Petitioner's pension. The only thing that changed during those 3 years was the Union officer who appointed the Trustees.

If the opinion of the Court of Appeals is not reviewed by this Court, pension rights will rest upon the shifting sands of union politics or the different interpretations of different Trustees. The reach of the opinion is not confined to the thousands of union pensions. Its unsettling effect permeates pensions of every kind.

Once universally accepted principles governing the vesting of pensions, the discretion to be exercised by Trustees, and the rights of thrid-party beneficiaries are now murky. Only action by this Court can restore the certainty and clarity which has been shattered by the opinion below.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Charles Saffo, et al., Plaintiffs, v. Occidental Life Insurance Company of California et al., Defendants.	Consolidated Cases No. 76-172 C (2) No. 76-201 C (2)

JUDGMENT

(Filed June 29, 1978)

In accordance with the Memordum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment against defendants on plaintiffs' complaint in an amount to be determined later; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants pay the costs of this action.

Dated this 29th day of June, 1978.

/ s / _____
H. Kenneth Wangelin
United States District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Charles Saffo, et al., Plaintiffs vs.	Consolidated Cases
Occidental Life Insurance Company of California et al., Defendants.	No. 76-172 C (2) No. 76-201 C (2)

MEMORANDUM

Filed June 29, 1978

These consolidated actions concern the reduction or elimination of pension payments to three retired employees of the Warehouse and Distributors Workers Union, Local 688 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Defendants are Occidental Life Insurance Company of California (Occidental), the Trustees of the Pension Plan established for employees of both Local 688 and the St. Louis Labor Health Institute (LHI) and Local 688. Plaintiffs Gibbons and Kavner are former officers of Local 688 and plaintiff Saffo is a former employee who was not an officer.

The Court has jurisdiction over these actions pursuant to 29 U.S.C. § 1132. A fairly lengthy non-jury trial was had and the Court has reviewed the entire record. Basically the issue before the Court is whether the Trustees acted appropriately in reducing plaintiffs' pension benefits to attempt to qualify as a tax exempt pension plan. After consideration the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. In 1965 Local 688 established a pension plan for its employees.On March 15, 1971 the Trustees of that plan signed a contract with Occidental whereby the Trustees agreed to forward all of Local 688 contributions in an agreed upon amount of Forty Dollars per week per active participant, to Occidental. Occidental agreed to pay benefits due under the plan. Under the plan monthly retirement benefits were calculated at Forty Dollars times years of credited service.

2. Kavner retired on January 1, 1972. Based upon a service date in exhibit B to the contract, he had thirty years of credited service, which entitled him to a pension of Twelve Hundred Dollars per month. Occidental paid him this amount from January 1, 1972 through April, 1975 when he was cut off entirely. Saffo retired on August 3, 1973 with twenty years credited service, and began receiving a pension of Eight Hundred Dollars per month. Beginning in November of 1975 his pension was reduced to Two Hundred Ninety Six Dollars and Four Cents ($296.04) per month. Gibbons retired on August 1, 1973 and, based upon a service date on Exhibit B to the plan, he received Twelve Hundred Dollars per month. From May, 1975 through October, 1975 his check was reduced to Nine Hundred and Sixty Dollars ($960.00) per month. In November, 1975, his check was further reduced to Three Hundred Sixty One Dollars and Five Cents ($361.05) per month. The Trustees have made all payments due under their contracts with Occidental.

3. Local 688 employees were notified of the details of the plan. Each of the plaintiffs continued his employment in reliance upon his right to receive a monthly pension calculated at Forty Dollars times his years of credited service, and each of them retired in reliance on the same. The employees of 688, including the three plaintiffs, agreed to forego a salary increase in order to fund their pensions.

4. Occidental agreed to "provide and guarantee" the pensions of all persons listed on exhibit B to the plan, including these plaintiffs. This guarantee was effective the day the contract was signed. Occidental's representations to the Trustees were calculated to lead them to believe, and did cause them to believe, that the guarantee was effective the day the contract was signed.

5 The 688 pension plan, excluding Occidental's guarantee, has never been actuarially sound under the actuarial assumptions used by Occidental. There is just no reasonable likelihood that contributions for 688 participants at the rate of Forty Dollars per week per active participant will ever be sufficient to pay pensions for 688 retirees given the actuarial assumptions used by Occidental. Under those assumptions on January 1, 1974 Occidental had incurred an actuarial liability of One Million Sixty Seven Thousand Dollars ($1,067,000.00) on its guarantee.

6. Because Occidental had guaranteed the pensions of Kavner and Gibbons, the Trustees' actions in cutting off Kavner's pension and reducing Gibbons' pension were of no benefit to any other plan participant. Occidental did not inform the Trustees of this fact.

7. Because of its guarantee and because it could not require increased contributions to pay exhibit B participants, Occidental was a risk taker and not a mere stakeholder. It took the risk of having to pay out more in pension than it received in contributions, and it stood to profit from high employee turnover by having the use of the pension fund for a longer period of time. Under its guarantee, proper artuarial practice required Occidental to maintain separate accounts for exhibit B and non-exhibit B participants, and to show its valuations on these accounts separately in its actuarial reports.

8. Because they could be removed by the union's officers, without cause, from their positions as Trustees, and because they were union employees who could be fired without cause, the Court finds that the Trustees were under the domination and control of the union and that their acts were the acts of the union.

9. The Court finds that it was not reasonable for the Trustees to believe that certain language in a letter from the district director of the Internal Revenue Service "required" them, in order to maintain the plan's qualification, to reduce benefits in an amount sufficent to make a plan be actuarially sound. However, even if the Trustees had believed that this letter required them to raise contributions there were several alternatives that should have been pursued. For example, it was not reasonable for them to diverst plaintiffs of their pensions without appealing such an order within the IRS. It was not reasonable for them to divest plaintiff's of their pensions without first seeking to require the union to make sufficient contributions to pay the pensions in accordance with its agreement. It was unreasonable for the Trustees to reduce benefits retroactively, rather than prospectively only, without first attempting to demonstrate to the IRS that a reduction which was prospective only was justifiable as a "business necessity". Finally, the Trustees acted unreasonably because an unknown portion of the reduction in benefits was attributable to changes in the plan which were not required by the IRS.

10. When Kavner was assigned to the International Union in 1958 he was given a "leave of absence" from Local 688 by Gibbons, the executive head of the Local, who had such authority. While Kavner was on assignment to the International he performed substantial services for Local 688. Also, his service to the International was of value to Local 688. For these reasons he did not have a "break in service" from 1958 through 1963 as that term is used in plan B.

11. Kavner was not guilty of fraud in placing on his retirement application the number of years of credited service to which he was entitled under the terms of the contract. Nor was he guilty of fraud in negotiating with Occidental a service date which included the period during which he was on assignment to the International.

12. There was no indication that Trustee Goodwilling[1] acted with the approval of the other Trustees in eliminating Kavner's pension. Even if the majority of the Trustees did concur their action was arbitrary and capricious because they did so without a hearing.

13. In 1949 Gibbons was the chief executive officer of an independant union known as the Joint Counsel which he merged with Local 688. The combined union was also known as Local 688 but was under Gibbons' leadership. His service date on exhibit B includes credit for his years as head of the Joint Counsel. Where there is a merger of two unions, it is in the best interests of both unions that the resulting entity recognized the service credits of the employees of both of the merging unions.

14. Gibbons did not commit any fraud with regard to his service date on exhibit B or with regard to the years of credited service on his application for a pension.

15. In its actuarial reports to the Trustees, and in the valuation summary submitted to the IRS, Occidental showed its own liability of One Million Sixty Seven Thousand Dollars ($1,067,000.00) on its guarantee as being part of plan B's unfunded actuarial liability. There is no evidence that Occidental ever informed either the Trustees or the IRS that its statement of plan B's unfunded actuarial liability included its own liability for the guarantee. Because they showed Occidental's liability as

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[1] The Court did not credit Goodwilling's testimony.

part of the fund's liability, the actuarial reports and valuation summary were misleading, deceptive and inaccurate. In submitting actuarial reports and a valuation summary which showed its own liability as a liability of the fund, Occidental failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by actuaries.

16. The misleading valuations shown on the valuation summary submitted to the IRS caused the district director of the IRS to question the actuarial soundness of plan B. This in turn caused the adoption of Amendment 4 which divested plaintiffs of their pensions.

17. In preparing a proposal for the Trustees as to the amount of reduction in prospective benefits it would require as a condition of adding the additional features to the plan which the Trustees desired, Occidental gave no credit for the amount by which its liability on the guarantee would have been reduced. Amendment 2, if it had gone into effect, would have substantially reduced Occidental's liability on its guarantee. Occidental withheld this information from the Trustees. The IRS then found that Amendment 2 would have constituted a "partial termination" of the plan, which would have disqualified it, because the actuarial value of the "improvements" was substantially less than the value of the cash benefits lost.

18. Amendment 4 reduced Occidental's liability to exhibit B participants by over Eight Hundred Thousand Dollars ($800,000), which fact Occidental did not tell the Trustees. In failing to disclose to the Trustees that Amendment 4 would reduce its own liability by over Eight Hundred Thousand Dollars ($800,000), Occidental failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by actuaries. The submission to the Trustees of valuation summaries, which Occidental claimed showed the amount of reduction necessary to both fund the "improvements" in Amendment 4 and make plan B actuarially

sound, without informing the Trustees that the amendment would reduce Occidental's liability by over Eight Hundred Thousand Dollars, ($800,000) constituted a material misrepresentation. Occidental knew the representation to be false, and intended for the Trustees to act upon it. The Trustees were ignorant of the truth, and relied upon the misrepresentation to the injury of the beneficiaries.

19. In reducing its payments to Gibbons and Saffo, and stopping payments to Kavner, Occidental committed breaches of contract. In permitting the Trustees to change plaintiffs' payment Local 688 committed breaches of contract. In directing Occidental to change payments to plaintiffs the Trustees acted in violation of the plan and the trust agreement.

20. In failing to inform the IRS that it had guaranteed over One Million Dollars of what it showed as the unfunded actuarial liability of plan B, Occidental was guilty of actuarial malpractice and breach of its contract to provide actuarial services and reports. In failing to inform the Trustees that Amendment 4 would reduce its own liability by over Eight Hundred Thousand Dollars ($800,000), Occidental was guilty of fraud, malpractice, breach of fiduciary duty and breach of its contract to provide services and reports.

Conclusions of Law

The theories of liability in this action are based upon the pension plan and the duties held under it by Occidental and the Trustees. The plaintiffs, having relied upon the existence of the plan in several ways, are entitled to enforce it. Plaintiffs' rights were vested and could only have been changed in accordance with the term of the plan and various statutory requirements.

The plan provided an unusual feature. In return for receiving custody of the fund, Occidental guaranteed the possession (pen-

sion) payments of "exhibit B" employees beyond the contributions made on their behalf. Thus in determining the solvency or "actuarial soundness" of the fund, the guarantee had to be considered. It was not considered, in part because of Occidental's misrepresentations and in part because of the Trustees failure to perform their duties diligently. Local 688 must share the responsibility for the Trustees' breach of duty because it controlled them so closely.

The reductions based upon changes in service dates will not be discussed in detail. The evidence simply does not support the service dates suggested by the Trustees for either Kavner or Gibbons.

There may be circumstances where Trustees of a pension plan, acting to protect its tax exempt status, could reduce benefits. This is not such a case. The pressure exerted on Local 688 and the Trustees by the IRS was in large part due to misinformation. Further, the reaction to that pressure was not reasonable. Thus it must be concluded that defendants should have continued to pay plaintiffs' pensions at the rates used in 1972, 1973 and 1974.

The question of damages presents greater problems. Plaintiffs seek a lump sum representing the present value of their benefits. The Court is more inclined to order payment of back benefits due and declare the rights of the parties under the pension plan, ordering continued payments. In any event, the parties (through counsel) are ordered to meet within twenty (20) days of this date to attempt to agree upon a proper amount of damages. They should report their efforts to the Court. If agreement cannot be reached, further briefs limited to that issue should be filed within thirty (30) days of this date. Plaintiffs also seek attorneys' fees and punitive damages. The Court does not consider punitive damages appropriate. However, plaintiffs are awarded attorneys' fees pursuant to 29 U.S.C. §1132(g).

The parties are instructed to attempt to agree on an appropriate amount under the procedure stated above.

Dated this 29th day of June, 1978.

/s/ _____
H. Kenneth Wangelin
United States District Judge

APPENDIX B

Unites States Court of Appeals
For the Eighth Circuit

No. 78-1634

Charles Saffo, Richard Kavner and Harold J. Gibbons,

Appellees,

v.

Occidental Life Insurance Company of California, a Corporation.

LHI-688 Employees Retirement and Pension Plan Trust; Philip L Goodwilling; Levi Sanford; Ernest Neidell; Paul Akers; Ronald Gamache; Michael Dunn; Kenneth Carroll; James Joiner; Chick Thornton; and John Becker,

Appellants.

No. 78-1638

Charles Saffo, Richard Kavner and Harold J. Gibbons,

Appellees,

v.

Occidental Life Insurance Company of California, a Corporation,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

LHI-688 Employees Retirement and Pension Plan Trust; Philip L. Goodwilling; Levi Sanford; Ernest Neidell; Paul Akers; Ronald Gamache; Michael Dunn; Denneth Carroll; James Joiner; Chick Thornton; and John Becker.

Submitted: February 14, 1979

Filed: June 1, 1979

Before HEANEY and McMILLIAN, Circuit Judges, and BENSON,* Chief Judge.

HEANEY, Circuit Judge

Charles Saffo, Richard Kavner and Harold J. Gibbons, retired beneficiaries of the LHI-688 Employees Retirement and Pension Plan Trust, brought this action against the trustees of the Plan, the officers of Teamsters Local Union No. 688,[1] and Occidental Life Insurance Company of California, alleging that their pension benefits were unlawfully curtailed or terminated. After a nonjury trial, the trial court found in favor of the appellees on the substantive issues. It reserved entry of a monetary award pending further consideration. On appeal, the trustees of the Plan, the officers of Local 688 and Occidental argue that the trial court erred in its interpretation of the Plan documents and that serveral of its factual findings are clearly erroneous. For the reasons outlined below, we affirm in part, reverse in part and remand for further proceedings.

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* PAUL BENSON, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

[1] The officers of Local 688 were sued as class representatives of the Union membership. Local 688 is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

I.

Factual History

In 1968, Harold Gibbons directed Richard Kavner to develop a joint pension program for Local 688 and the St. Louis Labor Health Institute (LHI). LHI is a nonprofit organization providing medical benefits to union members and is supported by a number of Teamsters' locals, including Local 688. It was established under Gibbons' leadership. During the period that the pension program was under development, Gibbons was Secretary-Treasurer and Chief Executive Officer of Local 688. Kavner, Gibbons' assistant, was supervisor of fringe benefits. LHI and Local 688 subsequently adopted an Agreement and Declaration of Trust which established the LHI-688 Employees Retirement and Pension Plan, effective January 1, 1968.[2] Under the provisions of the agreement, the trustees agreed to administer, under a single trust, contributions made on behalf of LHI and Local 688 employees. The agreement, however, contemplated that there would be two separate pension plans—Plan A for LHI employees and Plan B for Local 688 employees.[3] In separate determination letters, the Internal Revenue Service (IRS) held that each plan was a qualified plan under 26 U.S.C. §401(a), and that the trust was exempt from the federal income tax under 26 U.S.C. §501(a). From the adoption of the trust and plans in 1968 until March, 1971, the trustees administered the plans on a self-insured basis.

In late 1969 or early 1970, Kavner, at Gibbons' request, entered into negotiations with Occidental to provide increased

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[2] The necessary approval was obtained from the Executive Board of Local 688 and the Board of Directors of LHI.

[3] Plan A and Plan B were originally separate documents that were incorporated by reference into the Agreement and Declaration of Trust.

benefits for employees of Local 688, and to have Occidental "guarantee" the pension benefits of persons then employed by Local 688. After extensive negotiations, Occidental proposed a group annuity contract which provided that employees of Local 688 who met Plan B's eligibility requirements would be entitled to a monthly pension equal to $40 multiplied by the number of years of their credited service, as defined by the plan, up to a maximum of thirty years. Under the original Plan B, an employee received benefits equal to $300 per month for a period of sixty months after retirement and $110 per month thereafter. Occidental also agreed to "guarantee" the benefits of Local 688 employees employed at the time the contract was executed. These individuals were listed on Exhibit B to the contract along with their service date and birth date. The guarantee, §3.7 of the contract, provides:

> If the conditions of the Contract are met, or if Discontinuance of the Contract occurs after the conditions of the Contract have been met for the first twenty-five Contract Years, Occidental agrees to provide and guarantee all benefits which shall become payable under the Plan with respect to those Participants who are listed in the Schedule of Participants attached to the Contract as Exhibit B. For the purposes of this Section 3.7, and notwithstanding anything contained in the Contract to the contrary, the Contractholder and Occidental agree that the information and data contained in Exhibit B, as such Exhibit appears at the Contract Date, shall be binding and conclusive. Except as specified in this Section 3.7, Occidental shall not be responsible for the sufficiency of the Deposit Fund to provide the benefits specified in the Plan. Occidental shall have no liability except as provided in the Contract.
>
> The Contractholder and Occidental agree to modify or amend the plan or the Contract appropriately, if such action becomes necessary because of any Federal or State law or regulation which becomes effective after the Contract

> Date, and which imposes any condition, restriction, limitation or requirement on the operation of either the Plan or the Contract or both which, as determined by Mutual Agreement, would be such as to prevent Occidental from continuing its agreement under this Section.

Occidental agreed to provide these benefits if Local 688 contributed $40 per week per active participant to the pension plan.[4]

In keeping with the unified administration of the LHI-688 Pension Plan, the group annuity contract also provided for benefits to LHI employees. Full-time LHI employees meeting Plan A's eligibility requirements were entitled to $300 per month for a period of sixty months afer retirement and $110 per month thereafter. Part-time LHI employees were entitled to $135 per month for a period of sixty months after retirement and $90 per month thereafter. This was the identical level of benefits provided for in the original Plan A. Occidental did not guarantee these benefits. LHI was required to pay $12 per week for each full-time employee and $6 per week for each part-time employee to Occidental.

The trustees of the LHI-688 Pension Plan executed the group annuity contract on March 18, 1971. On the same day, they adopted amended Plans A and B retroactive to January 1, 1968.[5] Under the amended plans, the funds previously accumulated in the trust were transferred to Occidental. The amended plans were submitted to and approved by the IRS.

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[4] The contribution rate was lower during the earlier years of the contract but gradually increased. In 1970, Local 688 was required to contribute $22 per week per active participant; in 1971, $28 per week; in 1972, $34 per week; and in 1973 and thereafter, $40 per week.

[5] The two plans, although retaining distinct provisions, were incorporated into a single document.

Both LHI and Local 688 have continued to made the contributions required by the contract to Occidental.

Kavner retired on January 1, 1972, and in accordance with the service date specified in Exhibit B, received a pension of $1,200 per month. Saffo retired on August 3, 1973, and received a pension of $800 per month. Gibbons retired in August, 1973, shortly after he had been replaced as Secretary-Treasurer of Local 688 by Ronald Gamache, at a pension of $1,200 per month.[6]

In the summer of 1973, the trustees decided to adopt amendments to Plan B to correct what they considered as shortcomings in the plan. They sought to increase the break-in-service period, provide for vesting and early retirement and reduce the number of years necessary for normal retirement. To pay for these changes, the trustees initially considered increasing the $40 per week contribution of Local 688 for its employees. They rejected this option because they believed that Local 688 could not afford it. They then decided to reduce monthly pension benefits from $40 per month to $20 per month for each year of credited service.[7] This reduction in monthly benefits was prospective in nature and affected only those individuals who retired after December 31, 1973. Consequently, the monthly benefits of Saffo, Kavner and Gibbons would not have been altered. The trustees incorporated all of these proposed changes into Amendment 2, which they adopted on November 29, 1973. The adoption was made conditional upon IRS approval.

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[6] Gibbons was forced to resign from his position as Secretary-Treasurer as a result of serious internal strife among the officers and staff of Local 688.

[7] These figures were based upon information supplied by Occidental's actuaries.

On July 12, 1974, the IRS District Director for St. Louis notified the trustees that Plan B, if modified by Amendment 2, would no longer qualify as a tax-exempt plan. The letter to the trustees provided in relevant part:

> [I]t is our opinion that these changes to your plan constitutes a curtailment or "partial termination" within the meaning of I. T. Reg. §1.401-6(b)(2).
>
> The effect [that] a curtailment or partial termination will have on the qualified status of a plan depends primarily on (1) the existence of a valid business reason for the termination or curtailment consistent with the assumption that the plan from its inception has been a bona fide permanent program for the exclusive benefit of employees in general, and (2) compliance with the requirements of Section 401(a) of the Code in other respects from its adoption through curtailment.* * *
>
> In the instant case, the plan was amended in 1970 [sic] to provide for the $40 per month benefit for each year of service, and that in less than 4 years, the benefits were reduced (as were the Normal Cost figures thereunder) without evidence of business necessity. Absent this business necessity, the original assumption that the plan was a bona fide permanent program must be replaced with the presumption that the Union did not intend the plan to be permanent from the time the $40 benefit was first added in 1970 [sic].
>
> It is further noted that 3 of the 4 former employees who retired during this period were union officers,[1] members of the class in whose favor discrimination is prohibited by Section 401(a)(4) of the Code, and that between January 1, 1970 and January 1, 1974 (prior to the amendment) the un-

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[1] The President of Local 688, John Naber, had also retired during this period. He is not, however, a party to this action.

> funded liability had actually increased, indicating that the contributions made during that period were not sufficient enough to meet current years costs, i.e., normal cost plus interest on the unfunded liability. The presumption of permanency is even more difficult to accept in view of these facts.
>
> Accordingly, it is our opinion that the recent amendment to Plan "B" is to be treated as a partial termination, that neither requirement [(1) or (2) above] was met, and that said amendment was adversely affected the prior qualification of the plan.

The trustees appealed this decision to the Commissioner of Internal Revenue, who affirmed the District Director on March 28, 1975.

On April 25, 1975, the trustees revised the service dates of Kavner and Gibbons as they appeared on Exhibit B. The trustees determined that Gibbons and Kavner had impermissibly attempted to claim service dates based upon years of employment with unions that later merged into Local 688 in addition to their years of employment with Local 688. The trustees also determined that Kavner had incurred a break in service, as defined in the LHI-688 Pension Plan, and, consequently, was not eligible to receive any pension benefits. These actions had the effect of retroactively reducing Gibbons' monthly benefit from $1,200 to $960.00 and of terminating Kavner's $1,200 monthly benefit.

After the IRS rejected Amendment 2, the trustees proposed Amendment 4. Amendment 4 reduced the monthly benefit level for each year of credited service from $40 to $20.55, and reduced the maximum years of service that could be used in computing the monthly benefit from thirty to twenty-five years. The amendment was retroactive in nature and reduced the monthly benefit payments of all previous retirees as of their respective dates of retirement. Gibbons' monthly pension was reduced

from $960.00 to $493.20, and Saffo's monthly pension was reduced from $800.00 to $411.00. The trustees submitted the proposed amendment to the IRS for approval.

On August 11, 1975, the IRS approved the amendment. In a letter to the trustees, it stated:

> You were previously advised that an unexecuted amendment submitted in 1974 would cause the above-named plan to fail of qualification under Section 401 of the Internal Revenue Code. The amendment proposed to reduce the normal retirement benefit for future service from $40 to $20 times years of service. Our objection to the reduction was made under Section 401(a)(4) of the Code because only four employees had retired during the period in which the $40 benefit was in effect, and three of these employees were officers of the Union.
>
> On July 11, 1975, a proposed amendment was submitted to reduce the benefit from $40 to $20.55 for each year of credited service, retroactively effective to November 1, 1970. This amendment, if adopted, will reduce the existing benefits now being paid to the four retirees. It will also necessitate the return of the excess amounts already paid since 1970, either as a direct repayment or as an actuarial adjustment against their respective future benefits. The amendment will thus remove the discriminatory treatment apparent in the first proposed amendment.
>
> Accordingly, it is our opinion based on the data submitted that your recently submitted amendment to reduce the benefit retroactively to $20.55 will not adversely affect the qualified status of the plan.

The trustees formally adopted Amendment 4 on September 9, 1975.

At a meeting held on the morning of September 24, 1975, representatives of Occidental informed the trustees that overpayments to the retirees for the period since their respective dates of retirement to September 1, 1975, were as follows:

Harold J. Gibbons[9]	$17,416.80
Richard Kavner[10]	$49,200.00
John Naber	$16,880.00
Charles Saffo	$14,393.00
John Nedich[11]	$ 2,426.40

Occidental further advised the trustees that if each of the retirees' benefits, other than Kavner's, were reduced actuarially to provide for recoupment of the overpayments over a period of years, the reduction in benefits for each retiree would be calculated as follows:

	Reduced from (Monthly)	Reduced to by reason of Amendment No. 4 (Monthly)	Reduced to for actuarial repayment of overpayments (Monthly)
Harold J. Gibbons	$960.00	$493.20	$357.11
John Naber	$880.00	$452.10	$330.00
Charles Saffo	$800.00	$411.00	$284.56
John Nedich	$680.00	$410.00	$376.76

[9] The amount of overpayment to Gibbons includes excess payments based upon his incorrect service date.

[10] Since the trustees determined that Kavner had not been entitled to receive any pension, the amount of overpayment represents all sums paid to Kavner.

[11] John Nedich is not a party to this action. He retired subsequent to the conditional adoption of Amendment 2.

The trustees required Kavner to reimburse them in a lump sum.

The trustees held a special meeting on the afternoon of September 24, 1975. Gibbons, Naber, Saffo and Nedich attended the meeting. They were advised that it was necessary to reduce their benefits pursuant to Amendment 4, and that they would be required to reinburse the trustee either in a lump sum or by a further reduction in benefits. Gibbons and Saffo decided to reimburse the trustees by an actuarial reduction in benefits. It is unclear which option Naber and Nedich chose.

Gibbons, Saffo and Kavner instituted the present action in February, 1976, to have their pension benefits restored. The trial court found for them on the substantive issues. It held that the officers, trustees and Occidental had committed breaches of contract by reducing the payments to Gibbons and Saffo and by terminating the payments to Kavner. The trial court further held that Occidental was liable for actuarial malpractice and breach of contract for failing to inform the IRS of its guarantee and the effect of this guarantee on Plan B. It finally held that Occidental was liable for fraud, malpractice, breach of fiduciary duty and breach of contact for failing to inform the trustees that Amendment 4 would reduce its liability on the guarantee.

II.

Occidental's Arguments

Occidental raises several issues on appeal. Its arguments can be better understood if we first examine the analysis followed by the trial court in finding Occidental liable. It determined that under the contract Occidental had guaranteed the retirees' monthly benefits for life at the $40 benefit level existent at the date of their retirement. It found that absent the guarantee, Plan B was actuarially unsound under the actuarial assumptions used by Occidental. Consequently, Occidental had assumed the risk of paying out more in benefits than it received in contributions

since it could not require increased contributions to pay Exhibit B participants. It held that, under the circumstances, Occidental was a risk taker and not a mere stakeholder.

The trial court also found that as of January 1, 1974, Occidental had incurred an actuarial liability on its guarantee of $1,067.000, and that it had failed to reduce Plan B's unfunded actuarial liability by this amount in its actuarial reports to the trustees and in a valuation summary submitted to the IRS.[12] It concluded that the actuarial reports and valuation summary were misleading, deceptive and inaccurate, that they had caused the District Director of the IRS to question the actuarial soundness of Plan B in his July 12, 1974, letter to the trustees, and that they were a factor in the trustee's decision to adopt Amendment 4.

The trial court further found that Occidental knowlingly failed to disclose to the trustees, in its reports to them, that Amendment 4 had the effect of reducing its actuarial liability on the guarantee by over $800,000. It concluded that the reports were false and materially misleading, and that the trustees relied upon them in their decision to adopt Amendment 4.

The trial court held that Occidental was liable for actuarial malpractice and breach of its contract to provide actuarial services and reports. This holding was based on its failure to inform the IRS that it had guaranteed over $1,000,000 of what it showed as the unfunded actuarial liability of Plan B. It also held Occidental liable for fraud, malpractice, breach of fiduciary duty and breach of its contract to provide services and reports for failing to inform the trustees that Amendment 4 would reduce its own liability by over $800,000. It finally held that Occidental

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[12] The valuation summary was requested by the IRS after the trustees had submitted Amendment 2 to the IRS for approval.

had committed breaches of contract in reducing its payments to Gibbons and Saffo and stopping its payments to Kavner.[13]

A.

The Guarantee

We initially consider Occidental's arguments that the trial court erred in its interpretation of the guarantee and the guarantee's relationship to the LHI-688 Pension Plan. Occidental first argues that the guarantee is not a promise by it to pay the retirees' monthly benefits for life at the $40 benefit level existing at the date of their retirements. It contends that the guarantee only provides for payment of benefits "which shall become payable under the Plan," not fixed dollar amounts.

We find little merit to this argument. At the time the group annuity contract was executed, Plan B, as amended, provided that:

> The amount of Normal Retirement Annuity for a participant in the employ of Teamsters Local 688 will be equal to $40, multiplied by the number of years of Credited Service completed by the Participant at his Normal Retirement Date, up to a maximum of thirty years. Monthly payments of such Normal Retirement Annuity will commence on the Participant's Normal Retirement Date and will be payable thereafter for as long as he lives.

Occidental was fully aware of this $40 benefit level, and it had based its guarantee and its contribution rate on that level. For

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[13] Occidental was found liable to the retirees based upon third-party-beneficiary principles.

example, a May 15, 1970, letter from a vice-president of Occidental stated that:

> Our actuaries have stated that a benefit of $40.00 per month for each year of service up to a maximum of 30 years can be provided by the following contributions:
>
> Effective January 1, 1970 - $22.00 per week
>
> Effective January 1, 1971 - $28.00 per week
>
> Effective January 1, 1972 - $34.00 per week
>
> Effective January 1, 1973 - $40.00 per week

In a September 8, 1970, letter acknowledging receipt of the names, birth dates and service dates of the Exhibit B participants, the same vice-president stated that this "will be the date upon which the proposed guarantee will be based."

Occidental next argues that the guarantee is not effective until the group annuity contact has been in force for twenty-five years. Neither the language of the guarantee nor the intent of the parties supports this argument. The language of the guarantee indicates that it was effective immediately and is to remain in effect as long as the other conditions of the contract are being met. The only mention of a twenty-five-year condition is in the first paragraph of the guarantee which states that even if the contract is discontinued after twenty-five years, Occidental will continue to pay benefits to Plan B participants. Moreover, the evidence shows that the officers of Local 688 were concerned with providing pension benefits to Exhibit B participants that would be guaranteed during their lifetimes. Occidental recognized this concern and attempted to provide for it in the guarantee. Since several individuals retired shortly after the guarantee was written, it is incredible to suggest that the negotiators for Local 688 would have been satisfied with the guarantee that would not take effect for twenty-five years.

Occidental also argues that the guarantee does not become effective until the Deposit Fund become exhausted. This fund contains the accumualted contributions of both Local 688 and LHI. The contract does not support this requirement.

Section 2.3 of the contract provides:

> Occidental will notify the Contractholder if the Deposit Fund is not sufficient to permit any withdrawal required by Secion 3 with respect to any Participant who is not listed in the Schedule of Participants attached to the Contract as Exhibit B. The Contractholder will be required to make a Deposit sufficient to permit the withdrawal. The Deposit will be due on the date stated in the notice.

Under the interpretation urged by Occidental, the guarantee would effectively become a dead letter since the Deposit Fund cannot be exhaused. Occidental could merely use the fund to pay Exhibit B participants and then demand additional contributions for other participants in accordance with §2.3. In order to prevent this, the contract provides in §7.24:

> Occidental shall furnish the Contractholder with the following reports * * *.
>
> On a Contract Year basis:
>
> * * * *
>
> *Actuarial Report*—A report on the actuarial sufficeincy of the funds maintained under the Contract. The report will indicate the level of Plan benefits which can be supported by the contributions which are being made in connection with the Plan. However, *nothing contained in the actuarial report can in any way alter the agreement evidenced in Section 3.7* [the guarantee]. (Emphasis added.)

In other words, if the contributions for Exhibit B participants are too small to pay Exhibit B retirees, it would be a violation of §7.24 for Occidental to use money contributed for non-Exhibit B employees to make up that deficit and then demand higher contributions for the non-Exhibit B people to make up for a resultant shortage in that account.

Occidental next argues that it could not pay the retirees' monthly benefits based on the $40 benefit level without having several "conditions" embodied in the contract broken. The first of these is the condition that the plan be maintained as a qualified plan. Section 7.22 of the contract provides that:

> [t]he [trustees agree] to keep and maintain the Plan as a qualified tax-exempt plan under the applicable code sections of the Internal Revenue Code and regulations and rulings of the Internal Revenue Service.

Occidental reasons that the IRS required the trustees to adopt Amendment 4 in order to remove plan discrimination in favor of union officials. Thus, it had no alternative but to reduce the benefit level from $40 to $20.55 so as to preserve the plan's tax-exempt status.

We do not agree that the IRS required the trustees to adopt Amendment 4. The July 12, 1974, letter from the IRS simply notes that Amendment 2, as adopted, was discriminatory under 26 U.S.C. §401(a)(4) because the three retirees, who were union officers, would be receiving higher monthly benefits than subsequent retirees. The IRS was concerned with the differential benefit structure and not the level of benefits per se. Nothing in the letter suggests that the trustees must reduce the monthly benefits in order to remove the discrimination and preserve the plan's tax-exemption. From what appears in this record, the IRS would not have objected if the trustees had rescinded their conditional adoption of Amendment 2 and returned to the original plan. Occidental obviously had an interest in not sug-

gesting this as an alternative because Amendment 4 reduced its liability under the guarantee.

The second of these is the condition that both LHI and Local 688 contributions were to be used as a common fund to support all pension benefits under either Plans A or B. Occidental asserts that in 1975, the trustees directed it to separate Plans A and B because the IRS had objected to the "pooling" of contributions in order to support Local 688 pensions. It contends that this action deprived it of the single fund and, in effect, abrogated §2.1 of the contract which provides that:

> [I]n no event shall the amount payable to Occidental under the Contact be any less than the sum of the contributions which are payable with respect to all Participants under the Plan [which includes employees of both LHI and Local 688].

We agree with the trial court that the evidence does not support this contention.

At trial, Occidental attempted to prove that pooling was necessary in order to sustain the benefit levels requested by Local 688. Richard Eskoff, a vice-president of Occidental, related his experiences in negotiating the contract. He stated that after the initial meetings with Kavner in late 1969 and early 1970, Occidental proposed a pension program in May, 1970, with benefits almost identical to those provided under the original plan. Given the same benefit level, the various representatives of the LHI-688 Pension Plan saw no advantage in accepting the proposal. It was at that point that pooling was discussed as an alternative.[14] Occidental then reworked the contract so as to produce a higher benefit level. In doing so, it utilized contributions made on behalf of LHI to fund the higher benefits of

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[14] Eskoff could not recall who suggested the idea first.

Local 688.[15] Thus, it argues that pooling was an essential element of the contract.

This account is simply unsupported by the actuarial evidence. In its May, 1970, proposal, Occidental calculated the following contributions for LHI:

	Full-time employees	Part-time employees
Effective January 1, 1970	$12.00 per week	$6.00 per week
Effective January 1, 1971	$13.00 per week	$7.00 per week
Effective January 1, 1972	$14.00 per week	$8.00 per week

These contributions would have supported benefits for full-time employees of $300 per month for the first sixty months after retirement and $110 per month thereafter for life; and for part-time employees of $120 per month for the fist sixty months and $44 per month thereafter.

In the final contract, the contributions were *less* than in the proposal:

Full-time employees ..... $12.00 per week

Part-time employees ..... $ 6.00 per week

The benefits for full-time LHI employees, however, were the same as in the proposal, and the benefits for part-time employees actually *increased* to $135 per month for sixty months and $90 per month thereafter. Considering this evidence, we fail to see how Occidental can claim that there were excess LHI contributions to, in effect, subsidize Local 688

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[15] Occidental also notes that in IRS Form 4573, the Application for Determination of tax-exempt status, the trustees indicated that Local 688 would not be supplying all of the contributions necessary to provide benefits.

benefits when the LHI contributions were less and the benefits greater under the "pooled"contract than under the segregated one.

The third of these conditions is the requirment in §3.1 of the contract which provides that:

> Occidental shall make withdrawals from the Deposit Fund and to provide benefits under the Contract only as directed by the Contractholder.

Occidental claims that the trustees directed it to pay benefits based on the $20.55 level and that it would violate the contract if it did otherwise. This contention is merely a variation of Occidental's argument that it was not required to pay each of the retirees' monthly benefits at the $40 level because it had only promised to pay benefits "which shall become payable under the Plan." For the reasons previously discussed, we find little merit in this contention.

Occidental's final argument in regard to the guarantee is that the trial court's finding that Occidental's guarantee had a value of $1,067,000 for actuarial purposes was clearly erroneous. *See United States v. United States Gypsum Co., Inc.* 333 U.S. 364, 395 (1948); *Nye v. Blyth Eastman Dillon & Co., Inc.*, 588 F.2d 1189, 1196 (8th Cir. 1978); *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). We conclude that it is not.

Louis G. Prange, an actuary, prepared an estimated present value of the shortfall in Local 688 contributions compared to the value of benefits to be paid to Exhibit B participants. The present value of the shortfall indicates the cost to Occidental of its guarantee to Exhibit B participants. His calculations were based on assumptions and cost methods similar to those of Occidental and were as follows:

Year	Present Value of Benefits	Allocated Share of Assets	Present Value of Future Employer Contributions for Schedule B Participants	Present Value of Shortfall (1) - (2) - (3)
1970	$1,215,000	$ 33,000	$365,000	$ 818,000
1971	$1,698,000	$ 71,000	$617,000	$1,010,000
1972	$1,745,000	$134,000	$586,000	$1,026,000
1973	$1,734,000	$187,000	$516,000	$1,043,000
1974	$1,695,000	$221,000	$406,000	$1,067,000

Thus, at the time the contract was issued, Occidental apparently anticipated a loss of approximately $800,000, which amount increased to $1,067,000 in 1974.

Occidental asks us "to take judicial notice that insurance companies do not give away $1,000,000." We need not make a lengthy inquiry into Occidental's motives for its actions. We do note, however, that some evidence was presented at trial indicating that Occidental anticipated a higher rate of employee turnover than provided for in its actuarial calculations which would have reduced its potential liability. Moreover, Occidental may have desired to accomodate Gibbons because it handled several other penson plans involving Local 688 and the International.[16] As a vice-president in the International and as the Secretary-Treasurer of Local 688, Gibbons could have adversely affected Occidental's arrangements with these plans if he became displeased with Occidental.[17]

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[16] Occidental also handled the Teamsters Negotiated Pension Plan, a multi-employer pension plan, and the Teamsters Insurance and Welfare Fund. *See Celeste M. Castello v. Ron Gamache, et al.*, No. 78-1755, slip op. at 1-2 (8th Cir., March 9, 1979).

[17] Occidental also argues that it would be improper, under 26 U.S.C. §412(c)(2), for it to include the $1,067,000 as a pension plan asset. Insofar as the trial court did not require it to do so, we need not decide the issue. Louis Prange suggested several alternative methods of disclosing the value of the guarantee.

B.

Remaining Arguments

Occidental argues that the trial court was clearly erroneous in finding that Plan B was actuarally unsound under the actuarial assumptions used by Occidental excluding the guarantee. Occidental concedes that Plan B was actuarally unsound absent the pooling of Plans A and B.[18] We have previously concluded that pooling was not an intergral part of the contract. Consequently, it is unnecessary to us to address this argument further.

Occidental raises several arguments concerning the trial court's findings of breach of contract, malpractice, fraud and breach of fiduciary duty. It contends that these findings are clearly erroneous, reiterating many of the arguments it made with respect to the guarantee. We have carefully examined these arguments and find them to be without merit.

Occidental finally argues that if it is held liable in damages for complying with IRS-required changes to the LHI-688 Pension Plan, it was deprived of due process. As we have previously concluded that the IRS did not require these changes, we find this argument to be without merit.

	Plan B	
Plan Year	Minimum	Expected
1970	$115,784	$30,888
1971	$138,413	$72,800
1972	$119,734	$83,096
1973	$113,091	$81,120
1974	$131,523	$87,360

[18] Louis Prange demonstrated that expected contributions of Local 688 were significantly less than the minimum funding necessary to sustain the benefit level. His calculations were as follows:

III.

The Remaining Appellants' Arguments

The trustees of the LHI-688 Pension Plan and the officers of Local 688 raise several additional issues on appeal. They argue, initially that the trial court erred in determining that the trustees acted in violation of the plan and the trust agreement when, in accordance with Amendment 4, they directed Occidental to change payments to the retirees.[19] The trustees and officers contend that the retirees' pension rights were merely contractual and are governed by the terms of the plan documents. Since Plan B allowed the trustees to amend it, the retirees' rights could be adversely affected at a later date, provided that the trustees acted reasonably and in a manner consistent with the purposes of the trust agreement and the plan. When the IRS disqualified the plan and found it to be severly underfunded, the trustees were confronted with a situation that endangered the plan's survival. Under the circumstances, they argue it was appropriate and reasonable for them to adopt Amendment 4, and that their judgment should not be overturned by the trial court.

We disagree with the analysis of the trustees and officers. The retirees' pension rights are not as amorphous as they suggest. Ordinarily, pension rights, once they have vested, may not be altered without the pensioner's consent.[20] *Allied Chemical &*

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[19] They do not contest the trial court's findings that the trustees were under the domination and control of Local 688 and that Local 688 permitted the trustees to change retirees' payments.

[20] Section 203(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1053(a), sharply limits the situations in which vested rights can be divested. *Henry Winer v. Edison Brothers Stores Pension Plan,* No. 78-1327, slip op. at 7-8 (8th Cir., Feb. 21, 1979). ERISA §203(a) is not applicable to this case, however, since the

Alkali Workers v. P. P. G. Co., 404 U.S. 157, 181 n.20 (1971); *See* Note, *Penson Plans and the Rights of the Retired Worker,* 70 COLUM. L. REV. 909, 916-920 (1970). The retirees' penson rights were vested as they had complied with all conditions entitling them to participate in the plan[21] and had begun to receive benefits under it. *See Molumby v. Shapleigh Hardware Company,* 395 S.W.2d 221, 227 (Mo. Ct. App. 1965); *Feinberg v. Pfeiffer Company,* 322 S.W.2d 163 (Mo. Ct. App. 1959).[22] Moreover, the trustees' ability to divest a retiree of his pension benefits was strictly limited by §10.5 of the pension plan which provides that:

> [i]n no event may any amendment be made to the Plan which:
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> * * * *
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> (b) will devest any Participant of any benefit credited to him under the Plan before the effective date of the amendment, except as the same may be required by the U.S. Internal Revenue Service as a condition of preserving the Trust's Federal tax exempt status.

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decision to reduce or terminate retirees' benefits occurred prior to January 1, 1976. *See Henry Winer v. Edison Stores Pension Plan, supra* at slip op. 9-12.

[21] We conclude later in the opinion, however, that Kavner did not meet the plan's eligibility requirement and that he and Gibbons committed fraud with respect to their service dates.

[22] ERISA §514(a), 29 U.S.C. §1144(a), preempted all state law as it might relate to any employee benefit plan, with a few exceptions, effective January 1, 1975, although ERISA §203(a) did not become effective until after December 31, 1975. Note 19, *supra.* During this "gap" period, however, we may properly look to pre-ERISA state law. *See Keller v. Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1007-1009 (N.D. Ohio 1976). *But see Amory v. Boyden Associates,* 434 F.Supp. 671 (S.D. N.Y. 1976).

We also disagree with the trustees and officers that the IRS ever disqualified the plan. The August 11, 1975, letter from the IRS speakes of the "unexecuted amendment" that "would cause the above-named plan to fail of qualification." Our fundamental problem with their analysis, however, is the implication that there is a causal connection between the plan's underfunding and a disqualification. The IRS did not suggest that the plan would be disqualified unless the trustees corrected the underfunding. In fact, the trial court found that the trustees were unreasonable in concluding that the IRS required them to reduce retirees' benefits in an amount sufficient to make the plan actuarially sound in order to maintain the plan's qualification. This finding is not clearly erroneous.

The IRS commented on the actuarial soundness of the plan during its analysis of whether the increase in Local 688 benefits, occurring in 1971, was intended to be a permanent part of the plan or whether it was intended to be a temporary increase designed primarily to benefit former union officers. It observed that the plan's unfunded liability had increased between January 1, 1970, and January 1, 1974. It implied that, since this situation could not go on indefinitely, Amendment 2 was simply another step in an overall plan to reward the former union officers by increasing benefit levels during the period of their retirement.[23] The IRS concluded that if Amendment 2 were adopted, the plan would be disqualified. It did not, however, condition the plan's continued qualification on the removal of any underfunding.

We also observe that the trustees could not have adopted those portions of Amendment 4 which divested the retirees of their pension rights without violating §10.5 of the plan unless the IRS required them to do so in order to preserve the plan's

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[23] The IRS did not have before it the evidence showing that the plan was not actuarially unsound since Occidental had guaranteed the benefits of Exhibit B participants. *See* Part II.A., *supra*.

tax-exempt status. We conclude that the IRS did not. As we have previously observed in Part II.A., there is no language in either letter from the IRS to suggest that the plan would be disqualified unless the trustees reduced the retirees' pension benefits. The August 11, 1975, letter merely notes that Amendment 4 eliminated the objectionable features of Amendment 2. The trustees could have rescinded their conditional adoption of Amendment 2 and returned to the original plan.[24]

The trustees and officers finally argue that several other findings of the trial court are clearly erroneous. To understand these arguments, we set out in some detail additional information concering Gibbons' and Kavner's employment background.

Gibbons was first employed by the American Federation of Teachers in Chicago in the early 1930's. In 1936, he became the Assistant Director of the CIO in Chicago. From 1937 until 1940, he was Subregional Director of the Textile Workers Union in Louisville, Kentucky. He was assigned by the Textile Workers to work in Kansas City, Missouri, in 1940. In 1941, he was hired

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[24] There is some suggestion in the trial court's decision that Amendment 4 was not adopted in good faith. The evidence does indicate some self-dealing on behalf of the new officers of Local 688. An unknown portion of the reduction in benefits was attributable to changes in the plan that were unnecessary to correct either the underfunding or the impermissible discrimination. Amendment 4 not only reduced retirees' pensions, it (1) increased the break-in-service provisions from twelve months to forty-eight months; (2) reduced the minimum service necessary to qualify from twenty years to fifteen years; (3) provided for early retirement at age fifty with ten years of service; and (4) provided for early vesting. The only individual who benefited from increasing the break-in-service provision to forty-eight months was Ronald Gamache, the new Secretary-Treasurer of Local 688. Moreover, there is no evidence that Amendment 4 actually eliminated the purported underfunding.

as the Chief Executive Officer of the St. Louis Joint Board of the International Retail, Wholesale and Department Stores Employees Union, CIO. In 1948, he was instrumental in disaffiliating the St. Louis Joint Board from the International Retail, Wholesale and Department Store Employees Union. The St. Louis Joint Board continued as an independent organization until 1949, when it merged with Local 688. Prior to the merger in 1949, the St. Louis Joint Board had no affiliation with the Teamsters. Local 688 preexisted the merger and was separate and distinct from the St. Louis Joint Board. Thus, GIbbons' first employement by Local 688 was in 1949.

Kavner was employed by the International Retail, Wholesale and Department Store Employees Union, CIO, from 1939 until 1942, when he entered the armed services. In 1946, Kavner returned and was reemployed by the same organization. In the latter part of 1946, Kavner was assigned by the International to St. Louis, He remained in St. Louis until the merger in 1949, at which time he, too, was first employed by Local 688.

From February, 1954, until January, 1955, Kavner worked on a special organizing program with the Missouri-Kansas Conference of Teamsters and from February, 1955, until February, 1958, he worked as a "trouble shooter" for the Central States Conference. Kavner received a written leave of absence for Local 688 for both assignments. From March, 1958, through December, 1963, Kavner was employed by the Teamsters as a General Organizer. During this period, his salary, expenses and fringe benefits were paid by the International. He did not receive a written leave of absence for this assignment.

On the basis of the merger of the St. Louis Joint Board with Local 688, Gibbons and Kavner claimed service dates from 1938 and 1939, respectively, on Exhibit B. The trustees and officers argue that in doing so, Kavner and Gibbons perpetrated a fraud on the plan. The trial court found that they had not committed any fraud. We conclude that this finding is clearly erroneous.

At the time Gibbons and Kavner retired, there was no plan provision that authorized credit for past service with any employer other than Local 688. Section 1.11(a) of the plan provides:

> *Credited Past Service*—Each Employee who is in the employ of the Employer on the Effective Date will be credited with one year of Credited Past Service for each calendar year prior to the Effective Date in which he had at least 300 hours of continuous employment as an Employee or ten week in the armed forces of the United States.

An "Employee" is defined as an employee of Local 688 under Plan B. Gibbons and Kavner were aware of this provision yet they claimed past service credits from 1938 and 1939, respectively, although 1949 was the earliest date Local 688 had employed either of them. Moreover, employees of other merged unions were not given credited service for years of employment prior to their employment directly by Local 688.

The trustee also determined that Kavner suffered a break in service within the meaning of Plan B from March, 1958, through December, 1963, when he was employed as a General Organizer for the International. Consequently, he did not meet the plan's eligibility requirments for benefits. The trial court found that Kavner did not have a break in service. We conclude that this finding is clearly erroneous.

The plan provided that an employee's credited service would be broken if he left the service of Local 688 for a period of at least fifty-two consectutive weeks unless the employee has been granted a leave of absence in writing in a manner consistently and uniformly applied to all other employees or was in the armed forces of the United States. Kavner contends that he was granted an oral leave of absence by Gibbons when he accepted employment as a General Organizer. It is clear, however, that the plan requires a written leave of absence in order to avoid a

break in service. Kavner was aware of this requirement and had obtained written leaves of absence when he had accepted other positions outside of Local 688. Moreover, since other employees suffered breaks in service upon receiving transfers to other Teamster orginizations, allowing Kavner to utilize an oral leave of absence would violate the plan's requirement of uniform and consistent application.[25]

We conclude that under the circumstances, the trustees acted reasonably in reducing Gibbons' monthly benefit from $1,200 to $960 because of his decrease in years of credited servcie, and in discontining Kavner's $1,200 monthly benefit because of his break in service and seeking to recover the related over-payments.[26]

IV

Conclusion

The trial court's decision with respect to Saffo is affirmed. Its decision with respect to Gibbons is affirmed insofar as it relates to the decrease in the monthly benefit level, and reversed insofar as it relates to the reduction in benefits due to the incorrect service date. Its decision with respect to Kavner is reversed.

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[25] Kavner will continue to receive deferred compensation from Local 688 of $720 per month, $300 per month from the Central States Pension Fund, $1,046 per month from the Affiliates Pension Plan, $108 per month from the Banquet Foods Pension Plan, $1,300 per month from Labor Management Service Corporation, $300 per month from Local 102 and $300 per month from Council Plaza Redevelopment Corporation.

[26] Due to our dispositon of the case, it is unnecessary for us to determine whether Kavner's retirement was merely a sham.

With respect to the damage issues, the trial court indicated that it was inclined to order payments of back benefits due, declare the rights of the parties under the pension plan and order continued payment of the monthly benefits. In that event, Saffo would be entitled to receive a monthly payment of $800 and Gibbons would be entitled to receive a monthly payment of $960. Occidental would make these payments out of the assets of Plan B and, in accordance with its guarantee, would be liable for any deficiencies. Saffo and Gibbons wouls also be entitled to receive back payments. The trial court also permitted the parties to agree upon a proper amount of damages, including a lump sum representing the present value of the retirees' benefits. The parties obviously retain this option.

The decision of the trial court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Each party shall bear its own costs.

BENSON, Chief District Judge, concurring in part and dissenting in part.

I concur in the holding that the trustees acted reasonably in reducing Gibbons' monthly pension from $1,200 to $960 because of the decrease in his years of credited service, and in discontinuing Kavner's pension because of a break in service. Further, I would concur in a holding that the trustees had no authority to reduce Gibbons' and Saffo's monthly pensions to implement Amendment 4 unless such reduction was required to maintain the plan as a qualified plan, but will offer a further comment on the effect of such a holding. With respect to the holding of liability on the part of Occidental, I respectfully dissent.

When the trustees approached Occidental to negotiate the payment of benefits under a group annuity contract, they were interested in obtaining a benefit level that was more advan-

tageous than under the original plan. Occidental's first set of figures provided for a level of benefits that was almost identical to the origianl plan. This proposal was not acceptable to the trustees, so the pooling of the LHI-688 Plan funds was discussed. It is immaterial who initiated the discussion. It is clear that only the employees of Local 688 stood to gain from pooled funding, and that it was the trustees who pursued the idea. Occidental's actuaries prepared a second proposed schedule of contributions and level of benefits based upon a pooled method of funding. Under this proposal, Local 688 retirees would receive a monthly pension of $40 per year of credited service, a figure which was considerably higher than the benefit level under the original plan.[1] The trustees accepted this proposal and incorporated the $40 benefit level into Plan B. The proposed schedule ofemployer contributions, which was also based upon pooled funding, was attached to the group annuity contract as Exhibit C and made a part thereof.

Both Occidental and the trustees expressed serious doubt as to whether the IRS would approve the LHI-688 Plan on a pooled funding basis. The trustees were responsible for filing an application with the IRS for a determination of tax-exempt status. Prior to the submission of the plan to the IRS, Occidental wrote to the trustees to confirm that the legal and binding effect of the group annuity contract was contingent upon IRS approval of the LHI-688 Plan. The trustees fully intended to submit the LHI-688 Plan to the IRS as a single plan with a common fund, but with different benefit and contribution levels for the two sub-plans. However, rather than filing a single application, they filed separate applications for determination as to Plans A and B. The applications indicated that not all of the contributions

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[1]Occidental informed the trustees that Plan B would not be actuarially sound if it were isolated from Plan A, and that a considerably higher contribution rate would be necessary if Local 688 contributions were to fully support the $40 benefit level for Local 688 employees.

were to be paid by the employer in question, and the schedule of contributions (Exhibit C to the group annuity contract) was submitted as an explanatory reference. The explanation on the applications may not have been clear to the IRS because it issued separate determinations approving tax-exempt status for Plans A and B without comment on the fact that a pooled method of funding was being utilized. The trustees informed Occidental that the LHI-688 Plan had been approved, and both Occidental and the trustees thereafter proceeded on the assumption that the IRS had approved the pooled funding. Whether or not pooled funding was appropriate for the LHI-688 Plan, the evidence clearly and overwhelmingly shows that the trustees and Occidental both considered pooled funding to be a basis of their bargain, and that it was an integral part of the group annuity contract.

Under §3.7 of the group annuity contract, Occidental guaranteed (1) during the first 25 years of the contract, to pay the pensions of the Exhibit B retirees to the extent the schedule of contributions was insufficient to support the level of benefits under the plan, provided all employer contributions were made as scheduled; and (2) if the contract were discontinued after 25 years, and all conditions had been met during that time, to pay the entire pensions of the Exhibit B participants.

If, at any time during the first 25 years of the contract, the amount in the deposit fund were insufficient to pay the full benefist owed to all retirees, the amount in the fund would be prorated among the retirees in proportion to the amounts of their monthly pensions. Occidental would then be required, under its guarantee, to pay the balance of the benefits owed to Exhibit B retirees, and the employer would be required to make a deposit sufficient to pay the balance of the benefits owed to non-Exhibit B retirees.

The trial court adopted as its finding the opinion of plaintiffs' expert, Louis G. Prange, that Occidental's guarantee had an ac-

tuarial value of approximately $800,000 at the time the contract was executed, which value increased to over $1,000,000 by 1974. This "value" represented the amount by which the present value of Local 688 contributions for Exhibit B participants was exceeded by the present value of benefits to be paid to Exhibit B participants, without taking into account any pooling of the funds of Plans A and B.

It is undisputed that Plan B standing alone was never actuarially sound. The Local 688 contribution schedule prepared by Occidental was never intended to fully support the benefit level for Local 688 employees. Pursuant to the parties' agreement, Occidental's actuaries prepared the schedule of contributions and benefit levels on a pooled funding basis.

Under the evidence, Occidental had no reason to suspect that the IRS had not approved the LHI-688 Plan as a pooled fund. The first indication to Occidental that the IRS had not granted such approval came in 1974 when the IRS requested segregated financial data for Plan B in connection with its consideration of Amendment 2. Under these circumstances, Occidental did not act inappropriately in calculating the contribution schedules and benefit levels on a pooled funding basis.

Occidental did not have an anticipated loss of approximately $800,000 at the time it entered into the contract. The intent of the parties was that the guarantee constituted an undertaking on the part of Occidental to pay benefits to the Exhibit B retirees to the extent the pooled fund could not support the payment of such benefits. It is undisputed that the LHI-688 Plan was never actuarially unsound when considered as a pooled fund. Consequently, there was no basis for the assignment of an actuarial value to Occidental's guarantee. The trial court's findings with respect to the actuarial value of the guarantee are clearly erroneous.

The trial court's findings of breach of contract, malpractice, fraud and breach of fiduciary duty on the part of Occidental are

also clearly erroneous. The evidence clearly shows that the problems which arose from the "purported underfunding" of Plan B stemmed from the trustees and not from Occidental. The trustees' applications to the IRS did not indicate clearly that a pooled method of funding was being employed.[2] The IRS apparently did not become aware of the pooled funding until Amendment 2 was submitted in 1974. The trustees' adoption of Amendment 4 was motivated in part by the IRS's questioning of the financial soundness of Plan B. The adoption of Amendment 4 in turn resulted in the reduction of Gibbons' and Saffo's pensions.

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[2]The IRS "Application for Determination" form included three categories to describe the plan's employer contribution formula: "All," "Balance necessary," and "Other (Specify)." The trustees checked the "other" category and designated Exhibit C to the group annuity contract as the explanation of the formula.

Exhibit C provided:

SCHEDULE OF PARTICIPANT CONTRIBUTIONS
(as referred to in Section 2.1 of Contract)

Scale of contributions payable under the Plan as of January 1, 1970 with respect to each active participant in the Plan:

As to St. Louis Labor Health Institute—

Full-time employees	$12.00 per week	per active participant
Part-time employees	$ 6.00 per week	per active participant

As to Teamsters Local 688—

Calendar year 1970	$22.00 per week	per active participant
Calendar year 1971	$28.00 per week	per active participant
Calendar year 1972	$34.00 per week	per active participant
Calendar year 1973	$40.00 per week	per active participant

This was the only explanation in the application as to how the LHI-688 Plan was funded.

The trustees' adoption of Amendment 4 was also motivated in part by their desire to increase the number of Local 688 employees who would be eligible for benefits, particularly themselves. I agree that the trustees had no authority to reduce Saffo's and Gibbons' pensions to implement Amendment 4. However, the effect of this part of the court's holding deserves further comment. A review of the history of Plan B will be helpful to this discussion.

Under the original version of Plan B, employees would receive a pension of $300 per month for the first 60 months of their retirement and $110 per month thereafter. In 1971, the plan was amended to increase monthly benefits to $40 per year of credited service. Amendment 2, which would have gone into effect on January 1, 1974 if approved by the IRS, provided for reduction of the monthly benefit level from $40 to $20 per year of credited service for all future retirees. Thus, it would not have applied to the four employees who had retired while the $40 benefit level was in effect, including Gibbons, Kavner and Saffo.

In ruling on Amendment 2, the District Director of the IRS held that the reduction of benefits after only a short time, without evidence of business necessity, created a presumption that the plan was not intended to be permanent from the time the $40 benefit level was added. The District Director also noted the unfunded liability of Plan B had been increasing, and that three of the four employees who had retired at the $40 benefit level were union officers, members of the class in whose favor discrimination is prohibited by 26 U.S.C. §401(a)(4). Amendment 2 was held to be a partial termination of Plan B, which would adversely affect the plan's qualification.

The trustees appealed this decision to the Commissioner, who affirmed the adverse ruling both as to lack of business necessity and as to the discriminatory effect of the amendment. However, the Commissioner ruled the discrimination question was dispositive, stating:

As it turns out, the $40 per month rate obtains only during a relatively short period of time and benefits primarily officers of the Employer rather than employees in general.

Thus, it is our conclusion that the partial termination of the Plan resulting from Amendment No. 2 produced discrimination of the type prohibited by section 401(a)(4) of the Code. In this regard, it is immaterial whether or not there was a valid business reason for the partial termination, and whether or not Plan A and Plan B are treated as one plan or as separate plans.

The trustees subsequently adopted Amendment 4, which provided for a reduction of monthly benefits from $40 to $20.55 per year of credited service for all employees, including those who had already retired under the $40 level. When Amendment 4 was submitted for IRS approval, the District Director held that if the "excess" amounts already paid to the retired employees were recouped, Amendment 4 would remove the discriminatory treatment that had been apparent in Amendment 2, and would not adversely affect the plan's qualification. Thereafter, Amendment 4 was put into effect, and the trustees began to recoup the "overpayments."

Under the court's holding, Gibbons and Saffo will be entitled to monthly benefits of $40 per year of credited service, just as they were prior to the adoption of Amendment 4.[3] Employees who retire after the effective date of Amendment 4 will be entitled to monthly benefits of $20.55 per year of credited service as provided by Amendment 4. The effect of the court's holding is to limit Amendment 4 to prospective application, just as Amendment 2 was intended to do. And, as was the case with Amendment 2, the $40 rate will primarily benefit officers of Local 688. Thus, the court's holding will reinstate the discriminatory effect that was present in Amendment 2.[4]

In order to preserve the plan's qualification as a tax-exempt plan, the trustees will have no choice but to eliminate the

discrimination through revocation of Amendment 4 and reinstatement of the $40 benefit level for all Local 688 employees. Because a pooled method of funding is no longer being used, a substantial increase in Local 688's contributions to the plan will be required to support the higher level of benefits. There is substantial evidence in the record which indicates that Local 688 will not be able to afford this increase in contributions and may be forced to abandon the plan.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[3]Other employees who retired prior to the effective date of Amendment 4 will also be entitled to reinstatement of their pensions at the $40 rate. This, of course, does not include Kavner. His pension was discontinued because of a break in service, not because of Amendment 4.

[4]Such discrimination is prohibited by 26 U.S.C. § 401(a)(4), and is also contrary to § 10.5 of the LHI-688 Plan, which provides in part:

> In no event may any amendment be made to the Plan which:
>
> * * *
>
> (c) will cause or effect any discrimination in favor of officers or individuals whose principal duties consist of supervising the work of others, or highly compensated employees.

APPENDIX C

RETIREMENT AUTHORIZATION

Section I - To be completed by Administrator

Group Annuity Contract No.	Name of Participant	Sex	Soc. Sec. No.
50103-Q ~~50078-Q~~	RICHARD KAVNER	M	115-10-1214

Date of Birth (attach proof of age)	Name of Employer
November 19, 1912	Teamsters Local 688

Address to which checks are to be mailed

Number	Street	City	State	Zip Code
1244 Mesa Drive		St. Louis,	Missouri	63132

Normal Retirement Date: ________________, 19 __

Actual Retirement Date: January 1, 19 72

NORMAL ANNUITY FORM - XXXXXXXXXX 50% Life and Contingent Annuity
Amount of monthly annuity payable at Normal Retirement Date: $ 1,200.00

Section II - To be completed by Participant

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXX, PLEASE COMPLETE THE FOLLOWING:

Spouse's Name: ROSELYN KAVNER

Date of Birth: 8/23/23, 19 __
(attach proof of age)

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Section III - To be completed by the Trustees and Participant

Occidental Life Insurance Company of California is hereby authorized to withdraw from the Deposit Fund the amount necessary to provide the Participant's monthly annuity. It is understood that in the event the Participant has elected Early Retirement XXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX he will be provided with the amount of monthly annuity which can be provided by the actuarial equivalent, as determined by Occidental, of the amount of monthly annuity indicated above.

L.H.I.-688
THE TRUSTEES OF THE XXXXXXXXXXXXXXXX
PENSION TRUST FUND

By [illegible] Date: [illegible], 19 [illegible]

By [illegible] Date: 12/13, 19 [illegible]

PARTICIPANT'S Signature: [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-573

RICHARD KAVNER,

Petitioner,

v.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION, LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST, PHILIP L. GOODWILLING, LEVI SANFORD, ERNST NEIDEL, PAUL AKERS, RONALD GAMACHE, MICHAEL DUNN, KENNETH CARROLL, JAMES JOINER, CHICK THORNTON AND JOHN BECKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA

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Respondents.

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---

BRIEF IN OPPOSITION OF OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA

Respondent Occidental Life Insurance Company of California ("Occidental") opposes the granting of the petition for certiorari of Richard Kavner. For the reasons set forth in Occidental's petition in Docket No. 79-568, the decision of the Eighth Circuit in this case raises Federal issues of substantial importance and should be reviewed by this Court.[1] Those reasons, however, are unrelated to and not raised by Kavner's peti-

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[1] All references hereinafter to "Occidental's petition" are to the petition filed by Occidental in Docket No. 79-568.

tion here. The Eighth Circuit was correct in its determinations that Kavner had "perpetrated a fraud on the plan" in claiming a service commencement date of 1939, that he had incurred a "break in service" under the Local 688 pension plan by not having been granted a written leave of absence by Local 688 with respect to a nearly six-year period during 1958-1963 when he was employed by the International Brotherhood of Teamsters in Washington, D.C., and that therefore he had never been entitled to benefits under the plan. In any event, the petition of Richard Kavner raises no issues appropriate for review by this Court.

At page ten of his petition Kavner states: "The trial court's decision was not based upon ERISA, and no issue is raised with regard to that act herein." The arguments that are advanced in Kavner's petition essentially reduce to two basic contentions: (1) that the plan trustees' denial of his benefits was improper *under state law* (a contention which his petition, at page 12, states is governed by whether the plan trustees acted "arbitrarily or capriciously" in "retroactively" applying to him the clear plan requirement of a written leave of absence); and (2) that even if he was not entitled to benefits under the Local 688 pension plan, he was somehow, *again under state law,* entitled to benefits as a third-party beneficiary of the plan funding contract between Occidental and the plan trustees. The Eighth Circuit considered these state law arguments and determined them to be without merit.

Occidental, in its petition at pages 13-18, argues that the reliance on state law evident in both Kavner's petition and in the decision of the Eighth Circuit is misplaced. Kavner's claims regarding the April 25, 1975 termination of his benefits by the plan trustees should

have been treated as governed by Federal law under section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), which totally preempts, effective January 1, 1975, all state laws relating to any employee benefit plan covered by ERISA.

Because this case arises during the so-called "gap" period between the January 1, 1975 effective date of the ERISA preemption provision and the subsequent effective dates of various substantive provisions of ERISA, the appropriate Federal standard to be applied under ERISA is, for the reasons discussed at pages 17-18 of Occidental's petition, whether the trustees acted "arbitrarily or capriciously" in terminating Kavner's benefits. The Eighth Circuit specifically held that "the trustees acted reasonably . . . in discontinuing Kavner's $1,200 monthly benefit because of his break in service and seeking to recover the related overpayments." 602 F.2d at 1279. Thus, with respect to the termination of Kavner's benefits, the Eighth Circuit applied the correct legal standard even though it did not apply the proper law.

With respect to the Eighth Circuit's holdings of liability against Occidental and the trustees, on the other hand, application of state rather than Federal law clearly did result in application of an incorrect legal standard. See Occidental's petition at pages 17-22.

Kavner's argument that a conflict exists among the Circuits is fallacious. The cases he cites (at page 14 of his petition) involve situations in which plan trustees administering so-called Taft-Hartley plans were given discretion to establish eligibility rules and, after doing so, attempted to change those rules retroactively without sufficient justification. The decision below is not in

conflict with these cases because the instant case does not involve a change in the rules but rather the application of a rule which the Eighth Circuit held (602 F.2d at 1278) was clearly stated in the plan document.

There is simply no reason for this Court to review the Eighth Circuit's holding that the 1975 decision of the plan trustees was not arbitrary or capricious. The fact of the matter is that the trustees were enforcing an *unambiguous, unaltered* provision of the plan providing that "Credited Service" would not be "broken" if an employee were "on a leave of absence *authorized in writing* by the Employer. . . ."[2] Kavner's theory is that the written leave requirement was to be "prospective" only (*i.e.*, that it was not to apply to periods during which a plan participant was absent from Local 688 prior to the adoption of the plan in 1968), that the trustees so "interpreted" it in 1971, and that the current plan trustees impermissibly "changed the rules" after he retired. This theory raises no issue for this Court's review. It simply presents a factual question.[3]

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[2] The term "Credited Service" is defined in the plan itself to be the sum of "Credited Past Service" and "Credited Future Service." "Credited Past Service" is defined in terms of service *prior to* the January 1, 1968 effective date of the plan. Thus, the plan clearly contemplates "retroactive" application of the written leave of absence requirement. It should be noted that Kavner had in fact received written leaves for two periods of absence before his break in service during 1958-1963.

[3] Kavner's theory will not wash because, among other reasons, any prospective only "interpretation" would have been contrary to the *written* leave requirement of the plan and would have been inconsistent with the plan requirement that the leave of absence provisions be applied on a uniform and nondiscriminatory basis in that the written leave requirement was in fact applied to other employees who moved from Local 688 to other Teamster organizations.

Kavner's final argument in his petition (at pages 17-18) is that even if the trustees properly determined in 1975 that Kavner had never been entitled to benefits under the plan, Occidental remained liable to Kavner under state contract law by virtue of the funding contract between Occidental and the plan trustees. In the funding contract, however, Occidental agreed only to "provide and guarantee all benefits *which shall become payable under the Plan*" with respect to specified participants listed in Exhibit B to the contract. (Emphasis added.) Since Kavner did not meet the eligibility requirements of the plan, no benefits became payable to him thereunder. While Occidental and the plan (acting through its trustees) agreed that the age and service data set forth on Exhibit B would be "binding and conclusive," that statement meant only that the data was binding as between Occidental and the plan since it was on the basis of that data that Occidental extended to the trustees its conditional guarantee of the actuarial soundness of the plan. The statement plainly was not intended to insulate plan participants from the consequences of claiming improper ages or service dates.[4]

---

[4] Kavner implicitly admits as much by expressly declining (at page 6, n.4, of his petition) to raise the issue of the correct starting date for determining his "Credited Service" under the plan. On Exhibit B to the funding contract, and in the courts below, Kavner claimed service commencing in 1939. The Eighth Circuit, however, concluded that he had not been employed by Local 688 at any time before 1949. Allowing Kavner to bootstrap an entitlement to benefits by virtue of having claimed incorrect service data on Exhibit B would be inconsistent with both the plan's requirement of uniform and nondiscriminatory application of the written leave of absence provisions and the requirement of Internal Revenue Code section 401(a)(4), 26 U.S.C. § 401(a)(4), that a tax-exempt qualified pension plan not discriminate in favor of officers.

Insofar as the denial of Kavner's benefits is concerned, this case simply involves the application of a clear rule which is and always has been stated in the plan. Thus, it is at best hyperbolic to suggest, as Kavner's petition does (at pages 14-15), that the decision below invites the use of pensions as "instruments for political retaliation and retribution" or that it "threatens the stability of all pensions." The denial of Kavner's benefits invites nothing and threatens no one with anything more than the termination and attempted recoupment of benefits which should not have been paid in the first instance.

CONCLUSION

For the reasons expressed above, the petition of Richard Kavner for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS OTHER THAN OCCIDENTAL LIFE INSURANCE COMPANY

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TABLE OF CONTENTS

Authorities Cited

Cases:

Statutes:

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Supreme Court of the United States

OCTOBER TERM, 1979

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS OTHER THAN OCCIDENTAL LIFE INSURANCE COMPANY

Respondents other than Occidental Life Insurance Company pray that the Petition for a Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit is reported at 602 F.2d 1265. The unreported opinion and judgment of the United States District Court for the Eastern Division of the Eastern District of Missouri is reprinted as Appendix "A" to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 1, 1979. A petition for rehearing and a suggestion for rehearing en banc timely filed was denied by the Court of Appeals on July 9, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Trustees to terminate Petitioner's pension benefits because of a break in service under the terms of the plan is contrary to established principles of law or the law of the State of Missouri.

2. Whether the decision of the Court of Appeals is in conflict with established principles of law in holding:

A. That the Trustees properly refused to accept an oral leave of absence to avoid a break in service for benefit eligibility and accrual, when under the specific terms of the plan a written leave of absence was required for that purpose;

B. That the Trustees' application of the break in service provisions of the plan was consistent, and there was no evidence of discrimination; reasonable or unreasonable, between employees who obtained written leaves of absence and those who did not before the pension plan existed;

C. That the Trustees' interpretation of the break in service provisions of the plan was not arbitrary, capricious or unreasonable;

D. By implication that the Trustees are legally entitled to recover pension benefits paid to Petitioner.

3. Whether the decision of the Court of Appeals is contrary to established principles of law or the law of the State of Missouri in holding that Occidental is not obligated to Petitioner on its contractual guarantee.

4. Whether Petioner forfeited all rights to pension benefits because he perpetrated a fraud on the Trust and Plan with regard to the years of credited service to which he was entitled.

5. Whether Petitioner forfeited all rights to pension benefits because his purported retirement was fraudulent.

6. Whether Petitioner failed to meet minimum eligibility requirements for pension benefits.

7. Whether the decision below turns upon its own unique facts and is unlikely to affect a substantial number of other litigants.

STATEMENT OF THE CASE

Harold Gibbons, one of the plaintiffs below, was first employed by an organization known as the American Federation of Teachers in Chicago in the early 1930's. In 1936 he became the Assistant Director of the CIO in Chicago. From 1937 until 1940 Gibbons was Subregional Director of the Textile Workers Union in Louisville, Kentucky. In 1940 he was assigned by the Textile Workers to work in Kansas City, Missouri. In 1941 Gibbons was hired as the Chief Executive Officer of the St. Louis Joint Board of International Retail, Wholesale and Department Store Employees Union, an Organization affiliated with the CIO. In 1948 Gibbons was instrumental in disaffiliating the St. Louis Joint Board from the International Retail, Wholesale and Department Store Employees Union, and continued the St. Louis Joint Board as an independent organization until 1949 when the Joint Board merged with Teamsters Local

688. (A.[1] 155-156) Prior to the merger in 1949, the St. Louis Joint Board was an organization consisting of various local unions, and had no connection or affiliation with the International Brotherhood of Teamsters which was an organization affiliated with the AFL. (A. 74, 75-76, 156) Teamsters Local 688 preexisted the merger, and was an organization totally separate and distinct from the St. Louis Joint Board. (A. 78-79) Thus, Gibbons' first employment by Teamsters Local 688 was in 1949. (A. 142, 156)

Kavner, the Petitioner herein, was employed by the International Retail, Wholesale and Department Store Employees Union, CIO in the eastern part of the country from 1939 until 1942 when he entered the armed services. In 1946 Kavner returned from service and was reemployed by the same organization and assigned to work in New York for a short period of time. In the latter part of 1946, Kavner was assigned by the International Union to St. Louis; ostensibly for the purpose of assisting Gibbons in the operation of the St. Louis Joint Board, but in reality for the purpose of undermining Gibbons' authority. Kavner transferred his loyalty to Gibbons and remained in St. Louis until the merger in 1949, at which time he too was first employed by Local 688. (A. 36-38, 74-80, 112-113)

From February, 1954 until January, 1955, Kavner was assigned to work on a special organizing program with the Missouri-Kansas Conference of Teamsters. (A. 38-41) At the time of this assignment, Kavner obtained a written leave of absence. (A. 83-84) From February, 1955 until February, 1958 Kavner was assigned to work as a "trouble shooter" for the Central Conference of Teamsters. Gibbons orally agreed at the time of that assignment that Kavner would be on a leave of absence. (A. 41-42, 84-87)

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[1] "A" herein refers to the printed appendix filed with the Court of Appeals.

From March, 1958 through December, 1963, Kavner was employed by the International Brotherhood of Teamsters as a General Organizer. His salary, expenses and fringe benefits were paid solely by the International Union during this period of time, and not by Local 688. Although he may have performed some services for Local 688 while on this assignment, the vast majority of his actual working time was spent in performing his duties as General Organizer. Unquestionably, he was not a full time employee of Local 688 at this time, and he did not have a written leave of absence. (A. 88-89, 109-110, 156-157, 159-160, 344-348, 360-362, 387-388, 403, 431)

Prior to 1968 Gibbons, who was after the merger the chief executive officer of Local 688, instructed Kavner, his top assistant, to establish the LHI-688 Pension Plan. The basic provision of the Plans[2] were devised under Kavner's direct supervision with the assistance of various consultants and attorneys. From the adoption of the Trust and Plans in 1968 until March, 1971, the Plans were administered by the Trustees as self insured plans. In late 1969 or early 1970, Kavner, again acting on instructions from Gibbons, entered into negotiations with Occidental Life Insurance Company of California (Occidental). Gibbons and Kavner had two basic objectives in mind: (1) to provide increased benefits for employees of Local 688, including themselves; and (2) to obtain "guarantees" of pension benefits from Occidental for certain employees of Local 688, including themselves. Neither increased benefits nor "guarantees" for employees of LHI was ever discussed or con-

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[2] The Trust Agreement provided that the employers (St. Louis Labor Health Institute [LHI] and Local 688) desired common administration of their respective retirement plans for reasons of "convenience and economy;" but it was clearly provided in the Trust Agreement that ther would be two separate and distinct plans: Plan A for LHI employees and Plan B for Local 688 employees. (A. 246, 317-319, 321-322, 459) Kavner served as a Trustee of the Fund from its inception in 1968 until December 31, 1971. (A. 47, 69)

sidered. The employees of Local 688 for whom the "guarantees" were to apply were listed on Exhibit B to the Group Annuity Contract which was entered into with Occidental. At Kavner's request, Philip Goodwillng supplied initial employment dates of employees of Local 688 who eventually were listed on Exhibit B. The employment date of Gibbons which was furnished to Kavner was July, 1941, and Kavner's employment date was February 2, 1953, all of which information had been taken from their personnel files kept at the Union office. Kavner changed Gibbons' employment date to July 1, 1938, and changed his own employment date to November 1, 1939. Kavner kept Gibbons advised during his negotiations with Occidental. Those negotiations were concluded on March 18, 1971 when the Trustees executed the Group Annuity Contract and adopted amended Plans A and B retroactive to January 1, 1968. (A. 45-65, 68-73, 89-91, 111, 157, 349-350, 353, 362-368, 435-445)

It was always provided that the provisions of Plan B would only apply to regular full-time employees of Local 688 who were employed a minimum of 35 hours per week. (Appendix [3] C, Art. 1, §1.7) Credit for service prior to the effective date of Plan B was also calculated on the basis of full-time employment with Local 688. (Appendix C, Art. 1, §1.11[4]) There never was any provision for covering participants or crediting service on the basis of employment by any other employer. (Appendix A, preamble; Appendix B, Art. I, §§2), 7), 8), 9), 10); Art. III, §2); Appendix C, Art. 1, §§1.3, 1.7, 1.10, 1.11)

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[3] "Appendix" herein refers to the Appendix to this Brief in Opposition. Because of the number of exhibits, not all exhibits were reprinted as part of the Appendix in the Court of Appeals. For the convenience of this Court, the Agreement and Declaration of Trust is reprinted as "Appendix A" to this Brief, the original Plan B is reprinted as "Appendix B," and Plans A and B as amended on March 18, 1971 (effective January 1, 1968) are reprinted as "Appendix C."

[4] Plan A provided for part-time employees, but Plan B did not. (Appendix C, Art. 1, §§1.7, 1.8)

Gibbons and Kavner claimed service dates from 1938 and 1939 respectively on the basis of the 1949 merger of the St. Louis Joint Board with Local 688. (A. 109) Both Gibbons and Kavner were aware that they were claiming credited service, in part, based upon employment by employers other than Local 688 (A. 251-252), and both of them were familiar with the basic terms of the plan. (A. 46-65, 157)

The plan provided that an employee's credited service would be broken if he leaves the service of the employer for a period of at least fifty-two consecutive weeks, unless the employee has been granted a leave of absence in writing or was in the armed forces of the United States. (Appendix C, Art. 1, §1.11(d)) Kavner was well aware of the break in service provisions of the plan, including the requirement that to avoid a break in service by reason of a leave of absence the leave of absence must be in writing. (A. 96)

Kavner was employed by Local 688 as Gibbons' principal administrative assistant. As such he exercised broad, comprehensive administrative functions under Gibbons' direction. (A. 82-83, 148, 333) After his purported retirement on December 31, 1971, Kavner performed virtually the same duties and exercised the same authority as had been the case prior to his retirement. (A. 97-103, 164-165, 333-339, 358-360, 403-405, 431-432)

At the time of his retirement, Kavner's salary was approximately $20,000 annually. (A. 103) After he retired, Kavner's income from various sources was in excess of $60,000 annually. (A. 104-109)

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Decision of the Trustees to Terminate Petitioner's Pension Benefits Because of a Break in Service Under the Terms of the Plan is not Contrary to Established Principles of Law or the Law of the State of Missouri.

It is important to keep in mind the fundamental fact that Kavner was intimately aware of the basic terms of the Plan since he had personally negotiated them. (A. 44-65, 68-73, 157) Specifically, Kavner was familiar with the break in service provisions of the Plan. (A. 96) In response to a specific inquiry on this subject, the Plan's consultant, Remshardt, advised Petitioner by a letter dated September 28, 1971[5] that in order to avoid a break in service a leave of absence must be "authorized *in writing* by the Employer." (DOO Ex. TTT[6], emphasis supplied)

Clearly, Petitioner was not employed by Local 688 from March, 1958 through December, 1963 when he was employed by the International Brotherhood of Teamsters as a General Organizer, and he did not have a written leave of absence from Local 688. (A. 88, 109-110, 156-157, 159-161, 344-348, 360-362, 387-388, 403, 431) Under the clear terms of the Plan, in order to avoid a break in service a leave of absence must be in writing. (Appendix C, Art. 1, §1.11(d) (1))) Petitioner argues that this requirement is contrary to established law. The authorities cited by him, however, do not support this conclusion.

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[5] Three months prior to Petitioner's retirement.

[6] Attached hereto as Appendix D. "DOO" refers to "Defendants Other Than Occidental", the customary designation of these Respondents below.

Chemical Workers Local 1 v. *Pittsburgh Plate Glass Company,* 404 U.S. 157 (1971) involved the question whether it was an unfair labor practice for an employer to alter health insurance benefits for retirees unilaterally without bargaining with a union which represented the active employees. The comment in footnote 20 at page 181 of the Court's decision ("Under established contract principles, vested retirement rights may not be altered without the pensioner's consent.") is not determinative of the question presented herein because it presupposes, by use of the term "vested", that the pensioner has satisfied all requisite eligibility requirements. This conclusion is fortified by reason of the fact that the Court cites Note, 70 Col. L. Rev. (1970) as authority for the proposition quoted. That Note observes in analyzing the National Labor Relations Board's decision in the *Pittsburgh Plate Glass* case (177 NLRB No. 144) that it "is not itself a pension plan case." *Id.,* at 911. It is also noted that "it is the administrative board [Trustees] which is given the power to determine whether any individual is entitled to benefits under the plan. It must determine whether employees have vested rights under a plan, it approves applications for early retirement, and it supervises benefits payments to the retiree *who has fulfilled all requirements.*" *Id.,* at 909 (emphasis supplied) "*Upon complete fulfullment of plan requirements,* rights are completely vested." *Id.,* at 910 (emphasis supplied) Of course, the point here is that Petitioner had not fulfilled all Plan requirements because his break in service left him without the requisite 20 years of credited service to be eligible for pension benefits. (Appendix C. Art. 3, §3.1(b))

Molumby v. *Shapleigh Hardware Company,* 395 S.W.2d 221 (Mo. App. 1965), also cited by Petitioner, was a case where an employer ceased funding a unilateral, non-contributory pension plan. The St. Louis Court of Appeals noted (at page 227) as follows:

> "We have no quarrel with the theory that 'once an employee who has accepted employment under such plan, *has complied with all the conditions entitling him to participate in such plan,* his rights become vested and the employer cannot divest the employee of his rights thereunder.' However, in the instant case, plaintiffs ignore the fact that they have not complied with all conditions entitling them to participate in the Plan." (emphasis supplied)

Again, the question of vesting depends entirely on meeting all eligibility requirements which Petitioner has failed to do. Similarly, *Feinberg* v. *Pfeiffer Company,* 322 S.W.2d 163 (Mo. App. 1959) held that an employer was precluded by reason of promissory estoppel from discontinuing pension benefits for a retiree who had fulfilled all conditions for receiving the benefits.

Petitioner cites a number of decisions of the United States Court of Appeals for the District of Columbia which are likewise inapplicable. *Norton* v. *I.A.M. National Pension Fund,* 553 F.2d 1352 (D.C. Cir. 1977) involved denial of pension benefits by reason of a forfeiture provision adopted after the employee had satisfied all requirements for vesting but before he had applied for pension benefits. The Court of Appeals held that the forfeiture provision was unreasonable in that it was not rationally related to any legitimate purpose of the plan, and the application of the forfeiture provision was arbitrary and capricious under the facts of the case because the applicant had satisfied all preconditions for vesting prior to its adoption. *Lavella* v. *Boyle,* 444 F.2d 910 (D.C. Cir. 1971) held that it was arbitrary for trustees to deny pension benefits to an applicant who would have qualified under earlier industry service eligibility requirements, but did not qualify under more restrictve requirements adopted subsequently. *Kosty* v. *Lewis,* 319 F.2d 744 (D.C. Cir. 1963) also held that trustees arbitrarily denied pension benefits by reason of an eligibility requirement relating to industry service adopted after the applicant had met

the conditions of an earlier requirement. *Danti* v. *Lewis,* 312 F.2d 345 (D.C. Cir. 1962) held that it was arbitrary to deny benefits because of an industry service eligibility requirement adopted after the application for benefits was filed, where the applicant met the requirement in effect at the time the application was filed. *Lee* v. *Nesbitt,* 453 F.2d 1309 (9th Cir. 1972), also cited by Petitioner, held that it was unreasonable to apply a break in service provision to deny benefits when the applicant had satisfied all eligibility requirements in effect before the break in service occurred.

All of these cases are premised on the factual basis that the employee at some time met eligibility requirements in effect before a forfeiture provision was adopted. Of course, Petitioner is not in that position because the break in service provision in effect at the time of the original plan (Appendix B, Art. I, §11)) remained unchanged after Petitioner negotiated the amended plan with Occidental (Appendix C, Art 1, §1.11), and still was in effect at the time of his retirement. (Appendix D) The simple fact of the matter is he *never* satisfied the Plan's eligibility requirements.

Contrary to Petitioner's contention, break in service forfeiture provisions have received judicial approval and are recognized as valid. *Thurber* v. *Western Conference of Teamsters Pension Plan,* 542 F.2d 1106 (9th Cir. 1976); *Phillips* v. *Kennedy,* 542 F.2d 52 (8th Cir. 1976); *Hodgins* v. *Central States Pension Fund,* ____ F. Supp. ____, 81 LC par. 13,076 (E.D. Mich. 1976)

Petitioner argues that since his pension was originally approved, it cannot thereafter be terminated regardless of whether or not he was eligible. Of course, Kavner was a Trustee at the time his pension application was filed, and he had served in that capacity from the inception of the Plan in 1968. (A. 69) When the Trustees reviewed the facts in 1975 it became apparent that the initial approval of Kavner's pension had been erroneous

(Plaintiffs' Ex. 8, A. 461). The only proper thing for them to do at that point, consistent with their fiduciary obligations, was to terminate Kavner's pension benefits.[7] Contrary to Petitioner's contentions, the decision of the Court of Appeals will not be detrimental to future retirees who have complied with all eligibility requirements. It will be a distinct benefit to this and other pension plans by insuring that conditions for eligibility be properly enforced.

II. The Decision of the Court of Appeals is Not in Conflict With Established Principles of Law in Holding:

A. That the Trustees Properly Refused to Accept an Oral Leave of Absence to Avoid a Break in Service for Benefit Eligibility and Accural, When Under the Specific Terms of the Plan a Written Leave of Absence Was Required for That Purpose;

B. That the Trustees' Application of the Break in Service Provisions of the Plan Was Consistent, and There Was No Evidence of Discrimination, Reasonable or Unreasonable, Between Employees Who Obtained Written Leaves of Absence and Those Who Did Not Before the Pension Plan Existed;

C. That the Trustee's Interpretation of the Break in Service Provisions of the Plan Was Not Arbitrary, Capricious or Unreasonable;

D. By Implication That the Trustees are Legally Entitled to Recover Pension Benefits Paid to Petitioner.

A. At all times, the Plan by its clear terms required that a leave of absence must be in writing to avoid a break in service.

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[7] Petitioner's flights of fancy that Gibbons "was deposed ('resigned')" as the result of a "palace revolt" in 1973 (Pet. Pg. 14) is simply not supported in the record. (A. 406-407, 420)

This was the requirement when the plan was first adopted in 1968, it remained a requirement during all the time Kavner served as Trustee of the plan, it remained unchanged after Kavner negotiated the new plan with Occidental, and the identical requirement was in effect on December 31, 1971 when Kavner retired. (Appendix B, Art. I, §11; Appendix C, Art. 1, §1.11) Kavner, of course, was fully aware of this requirement. (A. 96; Appendix D)

On what possible basis, therefore, can Petitioner urge that the Court of Appeals should have required the Trustees to ignore the requirement that a leave of absence be in writing, and require them to accept an oral leave of absence contrary to the express terms of the Plan? Petitioner advances absolutely no factual basis or legal authority to support this result; and indeed none exists. Contrary to his argument where he urges that crediting service with an employer other than Local 688 should be read *into* the Plan's provisions, he is asking in that instance that clearly expressed Plan requirements be read *out* of the Plan. This the Court of Appeals properly refused to do.

B. Employees other than Kavner who left the service of Local 688 without a written leave of absence were held to have suffered a break in service, including employees who requested a written leave of absence but whose requests were denied. (A. 348-349, 390,407) There was no evidence that anyone was granted a written leave of absence in the past, other than Kavner. (A. 83-84) Thus, there is absolutely no basis for saying that employees were treated in a discriminatory manner in any respect. The evidence reveals consistent interpretation of the break in service provisions in precisely the same manner they were applied to Kavner. As the Court of Appeals properly found, "since other employees suffered breaks in service upon receiving transfers to other Teamster organizations, allowing Kavner to utilize an oral leave of absence would violate the plan's requirement of uniform and consistent application." (App. to Kavner's Petition for Certiorari, p. A-38).

C. It cannot be gainsaid that the approval of Kavner's pension by the Trustees when Kavner was one of those Trustees was erroneous. But when errors are discovered, it is incumbent on the Trustees to correct those errors. (A. 461) It is not embarrassing for the Trustees to admit to this Court that Kavner's pension should never have been granted. It would be most embarrassing, however, had they not taken the necessary steps to see that this error was properly corrected. Petitioner's argument that once a pension has been approved and payments made, those benefits are not subject to cancellation for any reason, is simply not the law. *Retail Clerks* v. *Burge,* ____ F. Supp. ____, 87 LC Par. 11,640 (D.C.D.C. 1979); *Steelworkers* v. *Crane Co.,* 605 F.2d 714 (3rd Cir. 1979)

D. It is interesting to note that after the decision of the Court of Appeals, Petitioner urged the District Court to deny recovery against him. Of course, his position before this Court is that recovery is the logical consequence of the decision of the Court of Appeals, as indeed it is.

There certainly would not be anything surprising in a finding by the District Court that Petitioner is required to repay pension benefits which he was not entitled to receive. That matter, however, is still before the District Court and is not ripe for review here.

III. The Decision of the Court of Appeals Is Not Contrary to Established Principles of Law or the Law of the State of Missouri in Holding That Occidental Is Not Obligated to Petitioner on Its Contractual Guarantee.

The extent of Occidental's obligations on its guarantee, and otherwise, is, of course, the subject of a separate Petition for a Writ of Certiorari pending before this Court in No. 79-568.

Suffice it to say here that Occidental's guarantee extended "to all benefits which shall become payable under the Plan." (A. 448) Since Petitioner was not entitled to benefits under the

terms of the Plan, it follows that Occidental's guarantee did not extend to him.

IV. Petitioner Forfeited All Rights to Pension Benefits Because He Perpetrated A Fraud on the Trust and Plan With Regard to the Years Of Credited Service to Which He Was Entitled.

Apart from the question of Petitioner's break in service, the Court of Appeals found that Petitioner was guilty of fraud in claiming credited service for employment with employers other than Local 688. (See page 36 of the Appendix attached to the Petition) This fraud disqualifies him from claiming pension benefits.

Kavner was aware that he was claiming credited service, in part, based upon employers other than Local 688 (A. 108, 251-252); and he, of course, was familiar with the basic terms of the Plan. (A. 45-65, 68-73, 157) A specific Plan provision in effect at the time Kavner retired permitted forfeiture of benefits for any misrepresentation by an applicant, including recovery of benefits paid in reliance on such misrepresentation. (Appendix C, Art. 9, §9.8)

It was always provided that the Plan would only apply to regular full-time employees of Local 688 who were employed for not less than 35 hours per week. (Appendix C, Art. 1 §1.7) Credit of service prior to the effective date of the Plan was also calculated on the basis of full-time employment by Local 688. (Appendix C, Art. 1, §1.11) There never was any provision for covering participants or crediting service on the basis of employment by any other employer. (Appendix B, Art I, §§7), 8), 9), 10); Art. III, §2); Appendix C, Art. 1, §§1.3, 1.7, 1.11)

Kavner claimed credited service from 1939, fully 10 years prior to his first employment by Local 688. This fraud constitutes an independant ground for terminating his pension benefits.

V. Petitioner Forfeited All Rights to Pension Benefits Because His Purported Retirement Was Fraudulent.

Another independent basis which supports the judgment of the Court of Appeals is that Kavner's retirement was pretextual.

Kavner was Gibbons' chief administrative assistant. As such, he exercised extensive power within Local 688. Next to Gibbons, no one in Local 688 had more authority than Kavner. (A. 80-83, 148, 333, 358-359)

Apparently, Kavner did not want to relinquish that power; but he was motivated to pretend to retire by the simple economic fact that he was thereby able to increase his income from approximately $20,000.00 annually (A. 103) to more than $63,000.00 annually. (A. 104-109) Obviously, this was a strong incentive to "retire".

Kavner announced his retirement as of December 31, 1971.[8] However, he continued thereafter to exercise his authority and duties with virtually no change. (A. 97-103, 164-165, 333-344, 358-360, 403-405, 431-432) Obviously, this depleted the assets of the Plan and constituted a fraud on the Trust and the Plan, by reason of which Petitioner has forfeited all rights to pension benefits. *Mendise* v. *Central States Pension Fund,* ____ F. Supp. ____, 80 LC par. 11,887 (N.D. Ohio 1975)

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[8] This was less than ten months after Amended Plan B was adopted, increasing the maximum pension from $300,00 for 60 months and $110.00 per month thereafter to a maximum of $40.00 multiplied by years of Credited Service up to 30 or $1,200.00. Kavner applied for and was granted a $1,200.00 per month pension. (App. to Plaintiff Kavner's Petition for Certiorari, p. A-14).

VI. Petitioner Failed to Meet Minimum Eligibility Requirements for Pension Benefits.

Even under a properly authorized leave of absence, a participant does not accumulate credited service during periods of absence from the employ of Local 688. Accumulation of credited service under the Plan requires continuous full-time service with the Employer (Local 688). (Appendix C, Art. 1, §§ 1.3, 1.7, 1.11) Thus, even if an employee does not incur a break in service by reason of employment with another employer, he does not accumulate credited service by reason of such employment. The Plan appropriately speaks in terms of years of credited service "completed" by the participant when it sets forth the manner in which retirement benefits are to be computed. (Appendix C, Art. 4, §§ 4.3, 4.5; Art. 5, § 5.3)

At the time of Kavner's retirement, a minimum of 20 years of credited service was required. (Appendix C, Art. 3, § 3.2) From the time of Kavner's initial employment by Local 688 in 1949 until his retirement on December 31, 1971 (a total of 23 years), he accumulated credited service of only 13 years and 4 months, far below the minimum required for eligibility. This conclusion is derived from the following analysis:

Kavner was assigned to work on a special organizing program with the Misouri-Kansas Conference of Teamsters from February, 1954 until January, 1955 (11 months). (A. 38-41, 83-84) He worked as a "trouble shooter" for the Central Conference of Teamsters from February, 1955 until February, 1958 (3 years or 36 months). (A. 41, 85-87) From March, 1958 through December, 1963 (5 years and 9 months or 69 months) Kavner was employed by the International Brotherhood of Teamsters as a General Organizater. (A. 88-89, 109-110, 156-157, 159-160, 344-348, 360-362, 387-388, 403, 431) Thus, from 1949 through 1971, Kavner was employed elsewhere for a

total of 116 months or 9 years and 8 months. Clearly, he did not have sufficient credited service to be eligible for a pension at the time of his retirement.

VII. The Decision Below Turns On Its Own Unique Facts and Is Unlikely to Affect a Substantial Number of Other Litigants.

This case is unique to itself. The facts of the case frame the issues, and those facts and issues are not likely to appear in a substantial number of other situations. Occidental's contractual guarantee, for example, is a most unusual contractual undertaking for an insurance carrier. (A. 254-255)

This Court's time and energies must be reserved for cases of broad national significance which involve important constitutional and statutory issues. The issues raised by this Petition are of limited significance, and resolution depends in large part on decisions of lower federal courts which have established uniform and consistent guidelines, and, to some extent, on state law. Even the comprehensive federal statute regulating pensions (ERISA, 29 U.S.C. § 1001 et seq.) is inapplicable because it was not enacted until 1974, long after Petitioner retired. **Steelworkers** v. **Crane Co.**, supra. Petitioner's rights, if any, are largely common law rights which have been adequately defined by lower federal courts and state courts. This Court's review of the matter is not appropriate under any of the standards applicable to a Petition for a Writ of Certiorari. (Rule 19)

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

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APPENDIX A

AGREEMENT AND DECLARATION OF TRUST

THIS AGREEMENT made effective as of the 1st day of January, 1968, by and between the ST. LOUIS LABOR HEALTH INSTITUTE, a pro forma decree corporation under the laws of the State of Missouri and hereinafter sometimes individually referred to as LHI, or Employer, or Plan "A" Employer, and TEAMSTERS LOCAL 688, which is a voluntary unincorporated association under the laws of the State of Missouri and hereinafter sometimes referred to as Employer or Plan "B" Employer, and RICHARD KAVNER, and JOHN NABOR, and C. E. ROCKENMEYER, each of whom is hereinafter individually referred to as Trustee and collectively referred to as Trustees.

WITNESSETH:

WHEREAS, each of the above-named Employers has adopted a retirement and family protection plan for certain of its employees, the plan for the employees of the LHI being hereinafter referred to as Plan "A" and the plan for the employees of TEAMSTERS LOCAL 688 being hereinafter referred to as Plan "B"; and

WHEREAS, each of the above-named Employers desires that its respective Plan (whether Plan "A" or Plan "B" as the case may be) be administered by the Trustees above-named in a single trust for purposes of convenience and economy for the benefit of the Participants therein; and

WHEREAS, under the respective Plans funds will be contributed to the Trustees, which funds as and when received by the Trustees will constitute a trust fund to be held for the benefit of the Participants in said Plans, and

WHEREAS, the above-named Employers desire the Trustees to hold and administer such funds and the Trustees are willing to hold and administer such funds pursuant to the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual convenants herein contained, the above-named Employers and the Trustees do hereby convenant and agree as follows:

Article I

1.1. This Trust shall be known as the LHI - 688 Employees' Retirement and Pension Plan.

Article II

2.1. The Trustees shall administer the respective Plans (i.e. Plan "A" and Plan "B") in accordance with the Plan Documents which are attached hereto and incorporated herein by reference as though fully set out and as the same shall from time to time be duly and properly amended.

Article III

3.1. It shall be the duty of the Trustees to receive and invest such funds as are paid to it by the respective Employers as contributions under the Plan Documents; to manage, invest and reinvest the Trust Fund held hereunder; to collect the income of such Trust Fund; and to make payments and transfers from the Trust Fund pursuant to this Agreement and the Plan Documents. However, the Trustees shall not be under any duty to compute the amount of contributions required to be paid by any Employer or to take any steps to collect such amounts as may be due the Trustees under the Plan Documents. Moreover, the Trustees shall be responsible only for the safekeeping and investment of the Trust Fund held by them as Trustees under the

terms of this Trust Agreement, and any liabilities under the respective Plans and Plan Documents shall be satisfied only out of such Trust Fund held by the Trustees hereunder.

3.2. It shall be the duty of each Employer, a party hereto, to pay over to the Trustees from time to time its contributions to the Trust Fund as provided in the Plan Documents; and to keep accurate books and records with respect to its Employees, their compensation, hours worked, and all other information relevant to the correct and accurate ascertainment of benefits under the Plan Documents.

Article IV

4.1. The Trustees shall have the following powers and authority with respect to the Trust Fund held hereunder to be exercised subject, however, to the provisions of Section 4.2 in such manner as the Trustees determine to be in the best interests of the administration of the Plans:

(a) To receive, hold, manage, improve, repair, sell, lease, pledge, mortgage, exchange or otherwise dispose of and deal with all or any part of the Trust Fund upon such terms, prices and conditions as they deem advisible.

(b) To invest and reinvest the Trust Fund in any property or undivested interests therein, wherever located, including bonds, notes (secured or unsecured), stocks of corporations, real estate or any interest therein, annuities and other policies of insurance and any qualified pooled trust upon such terms, prices and conditions as they deem advisable, without being restricted by any statute or rule of law governing the investments in which Trustees may invest funds held by them, and without regard to the proportion which an investment may bear to the entire amount of the Trust Fund.

(c) To purchase upon retirement of a Participant a single premium annuity from a life insurance company, which annuity

shall provide for and guarantee the payment of the benefits specified in Plan "A" or Plan "B" as the case may be, for the retiring pensioner. In such event, the purchase of said single premium annuity shall be subject to the following limitations and restrictions:

(i) No employee or other person authorized to make any election thereunder shall be permitted to elect an interest-only option;

(ii) No option shall be permitted to be elected which will extend payments hereunder beyond the life expectancy of an Employee and his spouse;

(iii) In the event there is or shall be provision made for the election of a joint annuity option, the selection of the annuitant must and shall be limited to the Employee's spouse unless the Plan shall herein elsewhere and otherwise provide that the Employee shall receive more than 50% of his benefits at normal retirement date during his lifetime.

(d) To borrow money upon such terms and conditions and for such purposes as they determine advisible.

(e) To vote in person or by proxy the stocks, securities or other investments which they hold as Trustees and to execute and deliver proxies, powers of attorney and other agreements which they deem advisible; to exchange the securities of any corporation or issuing authority for other securities upon such terms and conditions as they deem advisible; to consent to or oppose any corporate action; to pay all assessments and subscriptions as they deem advisable; to exercise options and, in general, to exercise all respect to all stocks, securities and other investments which they hold as Trustees all rights, powers and privileges as might be exercised by an individual in his own right.

(f) To arbitrate, compromise and adjust claims in favor of or against the Trust Fund upon such terms and conditions as they deem advisible.

(g) To execute such instruments, deeds, leases, mortgages, contracts, agreements, assignments, transfers, bills of sale and other documents of any kind, as they deem advisible.

(h) To retain uninvested cash in the Trust Fund to meet contemplated payments or transfers from the Fund, or temporarily awaiting investment, without liability for interest thereon.

(i) To cause stocks, bonds, securities or other investments to be registered in their name as Trustees hereof, or in the name of a nominee, or to take and keep the same unregistered, but in all such cases they shall be as fully responsible for such stocks, bonds, securities or other investments as if the same were registered in their name as Trustees.

(j) To employ such agents and counsel as they deem advisable or proper in connection with their duties as Trustees and to pay such agents and counsel reasonable fees. No agent or counsel so employed shall be disqualified by reason of any interest in the Trust or in any corporation whose securities comprise a part of the same. The Trustees shall not be liable for the acts of such agents and counsel or for acts done in good faith and in reliance upon the advice of such agents and counsel, provided they have used reasonable care in selecting such agents and counsel.

(k) To exercise all rights of ownership in any contracts of insurance in which any part of the Trust Fund may be placed or invested and pay the premiums or premium (if a single premium) thereon.

(l) To renew or extend or participate in the renewal or extension of any mortgage, upon such terms as may be deemed advisable, and to agree to a reduction in the rate of interest on any

mortgage or of any guarantee pertaining thereto, in any manner and to any extent that may be deemed advisable for the protection of the Trust Fund or the preservation of the value of the investment; to waive any default whether in the performance of any covenant or condition of any mortgage or in the performance of any guarantee or to enforce any such default in such manner and to such extent as may be deemed advisable; to exercise and enforce any and all rights of foreclosure, to bid in property on foreclosure, to take a deed in lieu of foreclosure with or without paying a consideration therefor and in connection therewith to release the obligation on the bond secured by such mortgage and to exercise and enforce in any action, suit or proceeding at law or in equity any rights or remedies in respect to any such mortgage or guarantee. Wherever the word "mortgage" is used herein, it shall be taken to mean and include a deed of trust.

(m) To make, execute and deliver, as Trustees, with or without a provision for no individual liability on their part, any and all deeds, leases, mortgages, conveyances, contracts, waivers, releases or other instruments in writing necessary or proper for the accomplishment of any of the foregoing powers.

(n) To pay out of the Trust Fund all real and personal property taxes and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Trust Fund, or any money, property, or securities forming a part thereof.

4.2. Notwithstanding anything to the contrary in this ARTICLE IV or any other section of this Trust Agreement, the Trustees shall not have power:

(a) To divert any part of the Trust Fund to any purpose other than for the exclusive benefit of Participants, former Participants, and beneficiaries under the respective Plans and Plan Documents attached hereto and incorporated herein by reference.

(b) To lend any part of the Trust Fund without adequate security and a reasonable rate of interest, to; to pay any compensation in excess of a reasonable allowance for services actually rendered, to; to make any purchase of securities or other property at more than fair market value, from; to sell any securities or other property for less than fair market value, to; to make any part of the Fund available on a preferential basis, to; or to engage in any other transaction which results in a substantial diversion of any part of the Trust Fund, to: the aforementioned Employers (or any of them) either individually or collectively.

Article V

5.1. All payments of benefits shall be made exclusively from the assets of the Trust Fund as they be constituted at the time or times of payment, or in the Trustees' discretion from the insurance company (if any) from whom the Trustees shall have purchased a single premium annuity policy; and no person shall be entitled to look to any other source (except those herein mentioned) for such payments.

5.2. The Trustees shall be entitled to pay any and all expenses of administering the Trust Fund held hereunder out of the income or principal of the Trust Fund to the extent that such expenses are not paid by an Employer or the Employers who are parties hereto.

5.3. In case of doubt concerning the course of the administration of the Trust Fund, the Trustees may request advice from their professional advisors (whether legal, accounting, actuarial or otherwise) and shall be fully protected in relying upon such advice when given.

5.4. Payments required to be made by the Trustees may be made by mailing by first class mail to the person to whom such payment should be made at the addresss of such person, supplied to the Trustees by the applicable Employer.

Article VI

6.1. The Trustees shall keep accurate and detailed accounts of all investments, receipts and disbursements and other transactions hereunder. All accounts, books and records relating thereto shall be open to inspection by any person or persons designated by any Employer, a party hereto, or any Participant, former Participant, or beneficiary under the Plan Documents at any reasonable time.

6.2. As promptly as possible and in any event within 90 days following the close of each fiscal year, the Trustees shall file with Employers and each of them a written account setting forth all sales and purchases of investment assets, all receipts and disbursements, and all other transactions effected by them during such fiscal year, including a description of the assets purchased and sold with the cost or net proceeds of purchases and sales and a statement of accrued interest paid and received; showing all cash, securiteis, and other properties held in the Trust Fund as of the end of such fiscal year; showing the profits or losses from sales of assets in the Trust Fund; and showing the market value as of the close of business on the last day of such fiscal year of the assets held in the Trust Fund. Such written account shall also be kept available for inspection upon reasonable notice and at reasonable times by any person or persons designated by a Participant, former Participant, or beneficiary under the Plan Documents.

6.3. After the written account referred to in 6.2 above has been in the hands of the Employers for 90 days, and has been otherwise available for inspection as provided herein for a period of at least 90 days, the accounting by the Trustees shall become binding upon all parties in interest under this Trust Agreement and under the Plan Documents, except as to such acts and transactions reported in such reports as to which the Employer or any other interested party shall file within such 90 days period a written statement claiming actual bad faith, fraud, or dishonesty on the part of the Trustees or any of them.

Article VII

7.1. The Trustees shall not be required to give any bond as Trustees or to qualify before, be appointed by, or account to any court of law in the exercise of their powers hereunder.

7.2. The Trustees shall use ordinary care and reasonable diligence in the exercise of their powers and the performance of their duties as Trustees hereunder, but shall not be liable for any mistake of judgment or other action (or omission thereof) taken in good faith, or for any loss, unless resulting from their own fraud, dishonesty, or actual bad faith.

7.3. Without limiting the generality of the foregoing, no Trustee shall be liable for the acts of omission of any other Trustee or of any officer, agent or employee selected with reasonable care, nor for loss incurred through investments of the Trust's money or failure to invest (except as above-stated). No Trustee shall be required to furnish bond or other security, but the Trustees may, by resolution duly adopted, provide for fidelity bonds with such companies and in such amounts, as they may determine, for Trustees or other persons who shall be authorized to receive or withdraw funds from the Trust Fund. Every person who is or shall be or shall have a Trustee of this Trust (and his personal representative) shall be indemnified by the Trust against all costs and expenses reasonably incurred by or imposed upon him in connection with or resulting from any action, suit or proceeding to which he may be made a party by reason of his being or having been a Trustee of this Trust or of any subsidiary or affiliate thereof, except in relation to such matters as to which he shall finally be adjudicated in such action, suit or proceeding to have acted in bad faith and to have been liable by reason of willful misconduct, fraud, or dishonesty in the performance of his duty as such Trustee. "Costs and expenses" shall include, but without limiting the generality thereof, attorney's fees, damages, and reasonable amounts paid in settlement.

Article VIII

8.1. The Trustees shall receive from the Trust Fund no compensation for their services in administering the Trust Fund but shall be reimbursed for their expenses properly incurred in connection with their duties.

8.2. The Trustees may employ or retain and prescribe the authorities and duties of accountants, legal counsel, actuaries, investigators, clerks, investment counsellors, and other advisors, agents and employees and procure any special services. The expense of such Trustee and the expenses and compensation of each person employer or retained as aforesaid, and the cost of any special services, shall be subject to approval by the Trustees, and if so approved, shall be paid from the trust property.

Article IX

9.1. Employers who are parties hereto may be unanimous action alter, amend or terminate this Trust Agreement at any time and in any manner for any reason without the consent of the Trustees or any other person, provided that such amendment or termination shall at all times be subject to the provisions of Article VII and Article VIII of Plan "A" and Plan "B" (constituting the Plan Documents) as the same shall be from time to time amended, and provided that no amendment affecting the rights, duties or responsibilities of the Trustees shall be adopted without the unanimous written consent of the Trustees. Any such amendment shall become effective as of the date provided in the amendment upon delivery of the written instruction of amendment as adopted by the unanimous action of the Employers (parties hereto) to the Trustees and the endorsement of the Trustees of their written agreement thereto.

Article X

10.1. The Employers, parties hereto, by unanimous action reserve the right to discharge any or all Trustees at any time by giving 30 days written notice thereto to the Trustee or Trustees so discharged.

10.2. Each Trustee reserves the right to resign as Trustee at any time by giving 30 days written notice thereof to the Employers who are parties hereto.

10.3. In the event of discharge or resignation of a Trustee or Trustees the Employers who are parties hereto shall be unanimous action, evidenced by an instrument in writing, appoint a successor Trustee or Trustees who shall succeed to all the rights, duties and responsibilities of a Trustee under this Trust Agreement. In such event the Trustee or Trustees shall be deemed discharged of all duties under the Trust Agreement and responsibilities for the Trust Fund.

10.4. The term Trustee or Trustees as used herein shall include any successor Trustee or Trustees; and any successor Trustee or Trustees shall have the same powers and duties as those conferred upon a Trustee or Trustees named in this Agreement.

Article XI

11.1. This instrument and the Trust herein created shall be termed a Missouri Trust and the validity, construction and effect thereof shall be governed by Missouri law. The Trustees shall be liable to account only in courts having jurisdiction in the State of Missouri and all contributions to the Trustees shall be deemed to take place in the State of Missouri.

11.2. The Trustees may at any time initiate an action or proceeding for the settlement of their accounts or for the deter-

mination of any question of construction which may arise or for instructions; and the only necessary parties defendant to such action (unless the same shall be contrary to Missouri law) shall be the Employers (except that the Trustees may, if they so elect, bring in as parties defendant any other person or persons).

11.3. It is the intent of the parties that this Trust be a trust exempt from income taxation under the federal income tax laws, and any ambiguities in construction shall be resolved in favor of interpretations which will effectuate such intention.

11.4. Anything herein to the contrary notwithstanding those provisions in the Plan Documents which define the rights, duties, and responsibilities of the Trustees and the rights of the Participants, former Participants and pensioners are herein incorporated by reference as though fully set out. To the extent (if any) that the provisions of said Plan Documents shall conflict with the provisions of this Agreement and Declaration of Trust, the provisions of this Agreement and Declaration of Trust shall be deemed to prevail and be binding upon all parties in interest.

St. Louis Labor Health Institute,
a corporation

by _____
Plan "A" Employer

Teamsters Local 688

by _____
Plan "B" Employer

Accepted as of the 1st day of January, 1968

_____

_____

_____

Trustees

APPENDIX B

PLAN "B"

Article I — Definitions

1) Plan "B" shall refer to the retirement and pension plan as described herein or as hereafter amended.

2) Effective date means January 1, 1968.

3) Trust Agreement shall refer to the Trust created by the Agreement and Declaration of Trust made and entered into effective as of January 1, 1968 (and as amended from time to time) by and between Teamsters Local 688 (a voluntary unincorporated association organized and operating under the laws of the State of Missouri) as the Plan "B" employer and the Trustees of the LHI - 688 Employees' Retirement and Pension Plan.

4) Trust Fund shall refer to all property of whatever nature which has been created by the Trust Agreement.

5) Employer, for the purposes of Plan "B", shall mean Teamsters Local 688 of the International Brotherhood of Teamsters, sometimes hereinafter referred to as Employer or as the Plan "B" Employer.

6) Trustees shall mean the Trustees designated in the Trust Agreement together with their successors designated and appointed in accordance with the terms of the Trust Agreement.

7) An employee, as herein defined for the purposes of Plan "B", shall mean any person regularly employed by the Plan "B" Employer whose customary hours are not less than thirty-five hours in any one week and for whom pension benefits have not otherwise been provided by virtue of required payments by the Plan "B" Employer pursuant to a collective bargaining agreement.

8) Covered Employment under Plan "B" prior to the Effective Date shall mean: (1) employment by the Plan "B" Employer as herein provided or (2) service in the armed forces of the United States under Selective Service or during a war or international police action if service was entered from covered employment as defined in sub-paragraph 1 next preceding.

9) Covered Employment under Plan "B" on or after the Effective Date shall mean employment by the Plan "B" Employer.

10) Year of Employment shall mean:

a) A calendar year prior to the Effective Date, including the calendar year in which the Effective Date occurs, in which an employee had at least 300 hours of covered employment for the Plan "B" Employer or 10 weeks in the armed forces of the United States; or

b) A calendar year subsequent to the Effective Date, including the calendar year in which the Effective Date occurs, in which contributions for a period of at least 20 weeks have been paid to the Pension Fund by the Plan "B" Employer on behalf of its employee.

11) A Break in Service within the meaning of Plan "B" shall occur when an employee of the Plan "B" Employer has left the service of said Employer for a period of at least 52 consecutive weeks. No Break in Service shall be deemed to have taken place by virtue of a leave of absence authorized in writing by the Employer or a leave of absence caused by an Employee's active service in the armed forces of the United States, as specifically stated in the sentence next following. Any Employee who leaves the service of the Plan "B" Employer to enter the armed forces of the United States of America during a period of national emergency or who enters such armed forces at any time through the operation of a compulsory military service law of the United

States of America shall be deemed to be on leave of absence authorized by the Plan "B" Employer (just as effectively as if in writing and approved by said Employer) during the period of his service in such armed forces and during any period after his discharge from such armed forces in which his re-employment rights are guaranteed by law. All leaves of absence granted by the Employer to Employees shall be granted on a uniform and consistent basis uniformly and consistently applied with respect to all Employees so that all Employees shall be treated in this respect on a non-discriminatory basis.

12) Continuous Service Shall mean covered employment under Plan "B" prior to retirement calculated from the employee's last employment or re-employment date following the last break in service.

13) Normal Retirement Date under Plan "B" shall mean January 1, 1971, or the date an employee of the Plan "B" Employer attains his 57th birthday, or the date said employee completes 20 years of continuous service, or the date said employee completes 3 years of continuous service under Plan "B", whichever last occurs.

14) Retirement Benefit shall mean the pension benefit provided for under Plan "B".

15) Disability Benefit shall mean the disability benefit provided for under Plan "B".

16) Pensioner shall mean an employee of the Plan "B" Employer who has applied for and is qualified for a retirement benefit.

17) The masculine pronoun whenever used shall include the feminine pronoun.

Article II — Eligibility

1) Every employee (as defined herein) of the Plan "B" Employer shall be a member of the Pension Plan, known and referred to herein as Plan "B".

2) Each employee of the Plan "B" Employer shall be deemed conclusively for all purposes to have assented to the terms of the Pension Plan and shall thereby be bound with the same force and effect as if he had executed it as a party thereto. Membership in the Pension Plan shall be deemed to continue until there has been a break in service.

Article III — Payment of Benefits

1) An employee (as defined herein) of the Plan "B" Employer who has reached the Normal Retirement Date shall be eligible for the retirement benefit provided for by Plan "B", if at retirement:

a) He has attained age 57; and

b) He has completed 20 years of continuous service with the Plan "B" Employer; and

c) He has completed 3 years of continuous service under Plan "B" as an employee of the Plan "B" Employer.

2) The retirement benefit to be provided for by Plan "B" on retirement on or after the Normal Retirement Date shall consist of a retirement income payable for the remaining life of the pensioner as follows:

a) For an employee who has completed at least 20 years of continuous service with the Plan "B" Employer and at least 3 years of continuous service under Plan "B" as an employee of the Plan "B" Employer,

i) $300.00 payable monthly for a period of 60 months next succeeding normal Retirement Date, said benefit to be paid and payable in any and all events whether or not the pensioner shall survive said 60 month period;

ii) $110.00 payable monthly thereafter for so long as the pensioner shall survive.

3) An employee of the Plan "B" Employer may continue in service after his Normal Retirement Date with the approval of the Plan "B" Employer. In the event of service beyond his Normal Retirement Date no payments of such employee's retirement benefits shall be made to him while he is still employed by the Plan "B" Employer. Upon actual retirement, he shall receive a pension in accordance with (a) next preceding. In the event of death after Normal Retirement Date but while still in the employment of the Plan "B" Employer (i.e. prior to retirement by virtue of the provisions herein stated for postponed retirement), the employee's spouse or spouse's estate or his estate or personal representative shall receive whatever pension benefits would have been paid to the employee during the 60 months next succeeding his Normal Retirement Date and in the same manner and pursuant to the same schedule of payments.

4) An employee of the Plan "B" Employer (a) who becomes totally and permanently disabled (as hereinafter defined) and (b) who becomes entitled to disability benefits payable under Title II of the Social Security Act (as evidenced by a Certificated of Social Insurance Award) shall be eligible for a disability benefit. The disability benefit provided for by Plan "B" shall consist of a disability income payable during the total and permanent disability of the said employee (so long as it shall exist) in a monthly amount of $100.00. The first payment shall be made forthwith upon receipt of due proof of such disability by the Trustees and shall include such amounts as are necessary to pay said $100.00 per month to the said employee for the month

in which the disability became total and permanent, as herein defined. Disability shall be deemed to be total and permanent whenever the employee of the Plan "B" Employer is wholly disabled by bodily injury or disease and will be permanently, continuously, and wholly prevented thereby from engaging in any occupation and performing any work for wage or profit. Evidence of disability, as herein defined, shall be certified in writing to the Plan "B" Employer by a reputable physician or surgeon selected by the Employer and licensed to practice medicine in the State of Missouri; once given, the certification of said physician or surgeon shall be binding upon the Employer, the Employee, and all other persons privy to their interests or affected by said determination.

5) The retirement benefit, under Plan "B", upon approval of a pensioner's application, shall be payable monthly beginning on the first day of the calendar month following the date of his retirement or on January 1, 1971, whichever is later. Anything to the contrary herein notwithstanding, in the event there shall be an amendment to the Plan increasing the benefits thereof, said increased benefits shall be paid and made available as of the effective date thereof to each and every pensioner still alive who has already retired under said Plan, so long as the Trustees shall first receive a written opinion from a qualified actuary that the payment of said increased benefits to persons already retired are actuarially sound and so long as said payments of increased benefits to such persons already retired do not violate any rules or regulations of the Internal Revenue Service or adversely affect the tax-exempt status of the Trust and Plan.

6) In case any benefit payments hereunder become payable to a person adjudicated incompetent or, by reason of mental or physical disability, in the opinion of the Trustees, who is unable to administer properly such payments, then such payments may be paid out by the Trustees for the benefit of such person in such of the following ways as they think best, and the Trustees

shall have no obligation or duty to see that the Funds are used or applied for the purpose or purposes for which paid:

a) directly to any such person;

b) to the legally appointed guardian or conservator of such person;

c) to any spouse, parent, brother or sister of such person for his welfare, support and maintenance;

d) by the Trustees using such payments directly for the support, maintenance, and welfare of any such person.

7) All applications for retirement, disability or death benefits must be made in writing, in the form and manner prescribed by the Trustees. Any misrepresentation by the applicant will constitute grounds for the denial of all benefits for the applicant or for the cancellation or recovery of benefit payments made in reliance thereon.

8) Application for retirement benefits shall be filed with the Trustees within a reasonable period after the effective date of the employee's retirement.

9) A pensioner who becomes re-employed by the Plan "B" Employer shall forfeit all right to benefit payments due on or after the first day of such employment. If the said employee again retires and reapplies for retirement benefit, and is otherwise qualified, subsequent benefit payments will begin on the first day of the calendar month which is more than 60 days after his subsequent retirement date. The retirement benefits of such an Employee who is re-employed, as set forth in this paragraph, shall in no event duplicate the benefits previously received or forfeited by him, or the right thereto, or result in any discriminatory increase of benefits to him or in his favor by virtue of his said re-employment, it being the clear intention of this Plan that in no event shall there be a duplication of benefits for any Employee, whether re-employed as herein stated or otherwise.

Article IV — Contributions

1) The Plan "B" Employer shall make continuing and prompt payments to the Trust Fund in the amount of $10.00 per week for each employee (as defined herein) until January 1, 1970, when said weekly payment for each employee shall become $12.50, unless and until said amount is changed by agreement between the said Employer and the Trustees. Any such change shall be prospective only and shall not lessen the obligation of the said Employer for contributions already accrued prior to the date of any such change.

2) Any and all contributions made by the Plan "B" Employer shall be irrevocable and shall be transferred to the Trustees and held as provided in this Pension Plan, known as Plan "B", and Trust Agreement to be used in accordance with the provisions of this Plan in providing the benefits and paying the expenses of the Pension Plan. Neither such contributions nor any income therefrom shall be used for or diverted to purposes other than the exclusive benefit of the employees or pensioners and for the payment of administration expenses of the Pension Plan.

3) Any forfeitures arising by death or otherwise shall be used to reduce future contributions and shall not be used to increase benefits of the employees.

Article V — Administration

1) The general administration of Plan "B" and the responsibility for carrying out its provisions shall be placed in the Trustees in accordance with the terms of Plan "B" and the Trust Agreement.

2) All rules, regulations, decisions and interpretations adopted by the Trustees shall be binding upon all parties dealing with the Trust Fund and all persons claiming benefits hereunder.

3) The assests of the Plan shall be conserved, invested and disbursed by the Trustees pursuant to the terms of Plan "B" and the Trust Agreement.

4) Every application for retirement, disability, termination or death benefits shall be made at the discretion of the Trustees. The Trustees shall be the sole judges of the standard of proof required in any case, except as herein otherwise specifically provided.

5) All benefit payments to Participants, if and when such payments shall become due, shall, except as to persons under legal disability, be paid to such Participants in person and shall not be grantable, transferable or otherwise assignable in anticipation of payment thereof, in whole or in part, by the voluntary or involuntary acts of any such Participants or by the operation of law, and shall not be liable or taken for any obligation of such Participants.

Article VI — Construction

The Trust Agreement and Pension Plan, known as Plan "B", are created and accepted in the State of Missouri. All questions pertaining to the validity or construction of the Trust Agreement and Plan "B" and the accounts and transactions of the parties shall be determined in accordance with the laws of the State of Missouri. Should any provision contained in the Trust Agreement or Plan "B" be held unlawful, such provision shall be of no force and effect, and the Trust Agreement or Plan "B" shall be treated as if such portion had not been contained herein.

Article VII — Vesting-Amendment Termination

1) No employee of the Plan "B" Employer or other person shall have any vested interest or right in the Trust Fund or in any payments from the Trust Fund. However, the rights of any per-

son who has become eligible for benefits hereunder by fully meeting the requirements of Plan "B" shall not be affected, changed or altered by any amendment to the Plan, unless the Trust Fund, in the opinion of the Trustees, is inadequate to meet the payments due. In such event, the Trustees shall determine whether benefits shall be reduced or the Trust terminated; however, nothing herein contained shall permit the reduction of benefits of a pensioner already retired for whom a single annuity policy has been purchased.

2) The Plan, referred to herein as Plan "B", may be amended by the Trustees from time to time provided that such amendments comply with the applicable sections of the then applicable Internal Revenue Code,and the purposes as set forth in the Trust Agreement.

3) In case of termination of the Plan, there shall be an actuarial revaluation of the Pension Plan. The method used to make the actuarial revaluation as of date of termination and discontinuance of contributions shall be as follow:

a) The single premium (including provisions for administrative expense) needed as of the date of discontinuance without further contributions to provide full benefits under the Plan to Participants already in retirement and receiving pensions.

b) The single premium (including provisions for administrative expense) needed as of the date of discontinuance without further contributions to provide benefits (in accordance with the foregoing) for all employees eligible for retirement but who have not yet retired, as if they had retired upon the date of such termination (but without the necessity of retiring).

If the remaining value of the holdings of the Trust Fund (allocable to Plan "B") after payments, as set forth in (a) above is not sufficient to pay the total of such single premiums, set forth in (b) above, the proportion which the remaining value of

the holdings of the Trust Fund (allocable to Plan "B") at date of discontinuance, after deductions, as set forth in (a) above, bears to the total of said single premiums for employees not in retirement computed as here set forth in this paragraph (b) shall become the proportion used to obtain the benefits provided for said employees not in retirement payable from the Trust Fund (allocable to Plan "B") after the date of discontinuance of the Plan.

4) In case of termination, payments shall be made to employees in accordance with the actuarial revaluation as set forth in 3(a) and 3(b) above, and in that order. In the event that the remaining value of holdings are not sufficient to pay employees already in retirement under 3(a) above, the entire Trust Fund (allocable to Plan "B") shall be used for that purpose so that all employees in retirement shall be treated equally and shall receive the same proportion of the full benefits to which they would be otherwise entitled. But nothing herein contained shall permit the reduction of benefits for pensioner already retired for whom a single permium annuity has been purchased.

5) In case of termination and if after payments in full in accordance with actuarial revaluations set forth in 3(a) and 3(b) above, there shall remain a surplus (allocable to Plan "B") in cash, securities or other properties in the hands of the Trustees, they shall distribute the surplus equally among all Plan "B" employees, both those not in retirement and those in retirement.

6) No modification or termination of this Plan shall permit the Employer to acquire any rights or benefits from monies paid the Trustees or to deprive the Participants of, or forfeit any of the benefits of this Agreement arising from contributions already made.

7) The interest of each Plan "B" Employee shall become completely vested upon the termination of this Plan "B" or upon the permanent discontinuance of contributions by the Plan "B" Employer.

Article VIII — Prevention of Discrimination

1) Notwithstanding any provisions in this Agreement to the contrary, during the first ten years after the Effective Date hereof, the benefits provided by contributions for employees whose annual benefit provided by such contributions will exceed $1,500.00, but applicable only to the twenty-five highest paid employees as of the time of establishment of the Plan (including any such high-paid employees who are not employees at that time but may later become employees) shall be subject to the following conditions:

2) (a) Such benefits shall be paid in full, including any withdrawal values available to a living employee and any death or survivor's benefits on behalf of an employee who dies after retirement, which have been provided by contributions not exceeding the larger of the following amounts:

(i) $20,000.00; or

(ii) An amount equal to 20% of the first $50,000.00 of the employee's average regular annual compensation multiplied by the number of years since the Effective Date of this Agreement.

(b) If the Plan is terminated or the full current costs thereof have not been met at any time within ten years after the Effective Date, the benefits which any of the employees described in sub-paragraph (1) above may receive from the contributions shall not exceed the benefits set forth in (a) herein.

(c) If an employee described in sub-paragraph (1) above leaves the employ of the employer when the full current costs have been met, the benefits which he may receive from contributions shall not at any time, within the first ten years after the Effective Date, exceed the benefits set forth in (a) herein.

(d) These conditions shall not restrict the full payment of any insurance, death or survivor's benefits on behalf of an

employee who dies while the Plan is in full effect and its full current costs have been met.

(e) These conditions shall not restrict the current payment of full retirement benefits called for by the Plan for any retired employee while the Plan is in full effect and its full current costs have been met.

(f) In the event of termination of the Plan within ten years after the Effective Date, distributions to all employees other than the employees described in sub-paragraph (1) above shall include an equitable apportionment among such other employees of all excess benefits purchased by contributions for the employees described in sub-paragraph (1) above, in the following manner: To each such other employee in the ratio of the contributions on his behalf to total contributions to all employees among whom such distribution is being made.

(g) If the benefits of or with respect to any employee shall have been suspended or limited in accordance with sub-paragraph (1) above because the full current costs of the Plan shall not then have been met, and if such full current costs shall thereafter be met, then the full amount of the benefits payable to such employee shall be resumed and parts of such benefits which have been suspended shall then be paid in full.

Certificate of Communication of Plan to Employees

State of Missouri }
City of St. Louis } ss

The undersigned President of St. Louis Labor Health Institute does hereby certify that the Pension Plan of such corporation, executed on August 27, 1968, was communicated to

all eligible employees on August 27, 1968, by delivery of a description of such Plan to all such employees, a copy of which is attached hereto, together with notification that a copy of the Plan is available for inspection at the office of the corporation.

_____

President

Sworn to and subscribed before me on this ____ day of _____, 1968.

_____

APPENDIX C

ST. LOUIS LABOR HEALTH INSTITUTE

EMPLOYEES PENSION PLAN (PLAN "A")

AND

TEAMSTERS LOCAL 688

EMPLOYEES PENSION PLAN (PLAN "B")

St. Louis Labor Health Institute
Employees Pension Plan (Plan "A")
And
Teamsters Local 688
Employees Pension Plan (Plan "B")
(As amended effective January 1, 1968)

Preamble

Effective January 1, 1968, an Agreement and Declaration of Trust was made and entered into by the St. Louis Labor Health Institute, a pro forma decree corporation under the laws of the State of Missouri, and Teamsters Local 688, a voluntary unincorporated association under the laws of the State of Missouri, with Richard Kavner, John Naber and Phillip Goodwilling, as Trustees.

Under the provisions of this Agreement and Declaration of Trust, the Trustees agreed to administer and to receive and hold, under a single trust, contributions under the St. Louis Labor Health Institute Employees Pension Plan (Plan "A") and the Teamsters Local 688 Employees Pension Plan (Plan "B").

Since the Plans' inception contributions by the employers have been increased, and an improvement in benefits for Participants under the Plans is now feasible. In addition, it is anticipated that benefits will now be payable under the group annuity contract entered into between the Trustees and an insurance carrier.

In order to accomplish the anticipated revision in the Plans, effective January 1, 1968, they are hereby amended in their entirety. The Plans, as amended effective January 1, 1968, shall be evidenced exclusively by the plan of retirement benefits contained in the following pages.

In no event will any Participant under the Plans receive less at Normal Retirement Date than had accrued to him under the Plans as originally stated.

Adoption And Execution Of Plan

To record the establishment of the Plans, as amended effective as of January 1, 1968, in accordance with the Agreement and Declaration of Trust, and their adoption by the respective Employers, the undersigned, being duly authorized to act on behalf of St. Louis Labor Health Institute and Teamsters Local 688, respectively, and as the Trustees appointed and acting under the Agreement and Declaration of Trust, have executed this document at St. Louis, Missouri, on March 18, 1971.

(As to Plan "A")

(As Employer) St. Louis Labor Health Institute

By /s/ John Naber
Title Sec. Tres.

(As to Plan "B")

(As Employer) Teamsters Local 688

By /s/ John Naber
Title President

The Trustees of the LHI - 688
Employees Retirement And Pension Plan Trust

/s/ John Naber
Trustee

/s/ Richard Kavner
Trustee

/s/ Philip L. Goodwilling
Trustee

TABLE OF CONTENTS

St. Louis Labor Health Institute
Employees Pension Plan (Plan "A")
And
Teamsters Local 688
Employees Pension Plan (Plan "B")

Article 1 Definitions

1.1 *"Plan"* is the plan of retirement benefits hereby established, as evidenced herein, to be known as the St. Louis Labor Health Institute Employees Pension Plan (Plan "A"), with respect to employees of the St. Louis Labor Health Institute, and the Teamsters Local 688 Employees Pension Plan (Plan "B"), with respect to employees of Teamsters Local 688, as evidenced herein, including any amendments thereto. The effective date of the Plan is January 1, 1968.

1.2 *"Trust Agreement"* is the Agreement and Declaration of Trust made and entered into effective January 1, 1968, by the St. Louis Labor Health Institute and Teamsters Local 688 with Richard Kavner, John Naber and Phillip Goodwilling, as Trustees, and establishing the LHI-688 Employees Retirement and Pension Plan Trust.

1.3 *"Employer"* is the St. Louis Labor Health Institute, with respect to Participants under the St. Louis Labor Health Institute Employees Pension Plan (Plan "A"), and Teamsters Local 688, with respect to Participants under the Teamsters Local 688 Employees Pension Plan (Plan "B").

1.4 *"Related Employer"* is Teamsters Local 688, with respect to Participants under the St. Louis Labor Health Institute Employees Pension Plan (Plan "A"), and the St. Louis Labor Health Institute, with respect to Participants under the Teamsters Local 688 Employees Pension Plan (Plan "B").

1.5 *"Trustees"* are the Trustees of the Pension Fund and their successors designated and appointed in accordance with the Trust Agreements.

1.6 *"Pension Fund"* is the Trust Fund established under the Trust Agreement with respect to the Plan and known as the LHI-688 Employees Retirement and Pension Plan Trust Fund.

1.7 *"Employee"* is any person in the regular employ of the Employer on a permanent, full-time basis who is not specifically excluded under this Article 1.7. The term *"Employee"* does not include any of the following:

(a) A Part-Time Employee. A Part-Time Employee is an employee who works less than thirty-five hours of regularly scheduled work per week.

(b) A temporary or seasonal employee. A temporary or seasonal employee is an employee who works less than twenty weeks of regularly scheduled work per calendar year.

(c) An employee of the St. Louis Labor Health Institute for whom the Employer is making contributions under another qualified pension plan pursuant to a collective bargaining agreement.

1.8 *"Part-Time Employee"* is any person in the regular employ of the St. Louis Labor Health Institute on a permanent basis who is not an Employee or specifically excluded under this Article 1.8. The term *"Part-Time Employee"* does not include any of the following:

(a) A temporary or seasonal employee. A temporary or seasonal employee is an employee who works less than twenty weeks of regularly scheduled work per calendar year.

(b) An employee for whom the Employer is making Contributions under another qualified pension plan pursuant to a collective bargaining agreement.

1.9 *"Participant"* is any Employee or Part-Time Employee participating in the Plan, including former employees or part-time employees who are receiving or who are entitled to receive benefits under the Plan.

1.10 *"Effective Date"* is the effective date of the Plan, which is January 1, 1968.

1.11 *"Credited Service"* is the period of an Employee's or Part-Time Employee's service with the Employer or the Related Employer which may be used for the purpose of computing the amount of retirement annuity to which the Participant is entitled under the Plan. *"Credited Service"* will be the sum of a Participant's Credited Past Service and his Credited Future Service and will be determined in accordance with the following:

(a) *Credited Past Service* - Each Employee who is in the employ of the Employer on the Effective Date will be credited with one year of Credited Past Service for each calendar year prior to the Effective Date in which he had at least 300 hours of continuous employment as an Employee or ten weeks in the armed forces of the United States.

Each Part-Time Employee who is in the employ of the Employer on the Effective Date will be credited with one year of Credited Past Service for each calendar year prior to the Effective Date in which he had at least 200 hours of continuous employment as a Part-Time Employee or ten weeks in the armed forces of the United States.

(b) *Credited Future Service* - Each Employee or Part-Time Employee will be credited with one year of Credited Future Service for each Plan Year in which contributions for a period of at least twenty weeks have been made to the Pension Fund by the Employer.

(c) Subject to the following conditions, continuous employment on a full-time basis with the Related Employer will be counted on the same basis as his continuous employment as an Employee or Part-

Time Employee with the Employer in determining an Employee's or Part-Time Employee's Credited Service:

(1) Not more than one year of Credited Service may be earned in any one calendar year.

(2) At least three years of Credited Service must be earned as an Employee or Part-Time Employee of the Employer.

(3) At his retirement date and for a period of two years next prior thereto the Employee or Part-Time Employee must have been an Employee or Part-Time Employee of the Employer.

(d) Except as stated in (1) and (2) below, an Employee's or Part-Time Employee's Credited Service will be broken if the Employee or Part-Time Employee leaves the service of the Employer and the Related Employer for a period of at least fifty-two consecutive weeks.

(1) Credited Service will not be broken if the Employee or Part-Time Employee is on a leave of absence authorized in writing by the Employer or the Related Employer or is totally and permanently disabled as defined in Article 6.3. All leaves of absence granted by the Employer to Employees and Part-Time Employees will be granted on a uniform and consistent basis uniformly and consistently applied with respect to all Employees and Part-Time Employees so that all Employees and Part-Time Employees will be treated in this respect on a non-discriminatory basis.

(2) Any Employee or Part-Time Employee who leaves the service of the Employer or the Related Employer to enter the armed forces of the United States of America will be considered to be on leave of absence authorized by the Employer (just as effectively as if in writing and approved by the Employer) during the period of his service in such armed forces and during any period after his discharge from such armed forces in which his re-employment rights are guaranteed by law.

1.12 *"Plan Year"* is each succeeding twelve month period from January 1, 1968, the last day of the first Plan Year being December 31, 1968.

1.13 *"Insurance Company"* is the insurance carrier selected in accordance with Article 8.1 to issue the group annuity contract financing the benefits provided under the Plan.

1.14 *"Pension Contract"* is the group annuity contract between the Insurance Company and the Trustee which is issued in connection with the Plan.

1.15 *"Employer Contributions"* are contributions which the Employer makes irrevocably to the Pension Fund for the purposes of the Plan, in accordance with the Trust Agreement.

1.16 The masculine gender includes the feminine wherever appropriate.

Article 2 Participation

2.1 *Eligibility.* Each Employee or Part-Time Employee will automatically become a Participant on the later of the following dates.

(a) The Effective Date.

(b) The date the Employee or Part-Time Employee becomes an Employee or Part-Time Employee for whom contributions are being made in accordance with the Trust Agreement.

2.2 *Continuing Membership.* Each Participant will be deemed conclusively and for all purposes to have assented to the terms of the Plan and will be bound with the same force and effect as if he had been a party to the execution of the Plan. A Participant's membership in the Plan will be deemed to continue until a break occurs in the Participant's Credited Service.

Article 3 Retirement Date

3.1 *Normal Retirement Date (St. Louis Labor Health Institute).* The Normal Retirement Date for a Participant then in the employ of the St. Louis Labor Health Institute will be the first day of the month coinciding with or next following the latest of the following dates:

(a) The Participant's 65th birthday.

(b) The date the Participant completes twenty years of Credited Service.

(c) The date the Participant completes five years of participation in the Plan.

3.2 *Normal Retirement Date (Teamsters Local 688).* The Normal Retirement Date for a Participant then in the employ of Teamsters Local 688 will be the first day of the month coinciding with or next following the latest of the following dates:

(a) The Participant's 57th birthday.

(b) The date the Participant completes twenty years of Credited Service.

(c) The date the Participant completes two years of participation in the Plan.

3.3 *Postponded Retirement Date.* A Participant may elect a Postponed Retirement Date and remain in the active service of the Employer after his Normal Retirement Date. Such Postponed Retirement Date may be the first day of any month following his Normal Retirement Date. In this case, the Participant's retirement annuity payments will commence at his Postponed Retirement Date in an amount as determined under Article 4.4 or 4.5, as applicable.

Article 4 Retirement Benefits

4.1 *Normal Retirement Annuity.* If a Participant retires at his Normal Retirement Date, he will be entitled to receive a Normal Retirement Annuity in an amount as determined under Article 4.2 or 4.3, as applicable. The Normal Retirement Annuity will be payable as a monthly annuity on the normal annuity form described in Articles 4.2 or 4.3, as applicable, with the first monthly payment payable on the Normal Retirement Date, if the Participant is then living.

4.2 *Amount and Form of Normal Retirement Annuity (St. Louis Labor Health Institute).* The amount of Normal Retirement Annuity for a Participant in the employ of the St. Louis Labor Health Institute will be determined as follows:

(a) A Participant who completes all of his Credited Service as an Employee will receive an amount of Normal Retirement Annuity equal to $300 payable monthly for a period not to exceed sixty months during his lifetime and $110 payable thereafter for as long as he lives.

(b) A Participant who completes all of his Credited Service as a Part-Time Employee will receive an amount of Normal Retirement Annuity equal to $135 payable

monthly for a period not to exceed sixty months during his lifetime and $90 payable thereafter for as long as he lives.

(c) A Participant who completes his Credited Service not wholly as an Employee nor as a Part-Time Employee will receive an amount of Normal Retirement Annuity which is fairly and equitably pro-rated and adjusted accordingly as between the benefits set forth in subparagraphs (a) and (b), above, and such pro-ration will be based upon the respective lengths of Credited Service completed as an Employee and Part-Time Employee.

4.3 *Amount and Form of Normal Retirement Annuity (Teamsters Local 688).* The amount of Normal Retirement Annuity for a Participant in the employ of Teamsters Local 688 will be equal to $40, multiplied by the number of years of Credited Service completed by the Participant at his Normal Retirement Date, up to a maximum of thirty years. Monthly payments of such Normal Retirement Annuity will commence on the Participant's Normal Retirement Date and will be payable thereafter for as long as he lives.

4.4 *Amount and Form of Postponed Retirement Annuity (St. Louis Labor Health Institute).* The amount and form of payment of monthly annuity payable to a Participant in the employ of the St. Louis Labor Health Institute at his Postponed Retirement Date will be the same as if the Participant had retired at his Normal Retirement Date.

4.5 *Amount and Form of Postponed Retirement Annuity (Teamsters Local 688).* The amount of Postponed Retirement Annuity for a Participant in the employ of Teamsters Local 688 will be equal to $40, multiplied by the number of years of Credited Service completed by the Participant at his Postponed Retirement Date, up to a maximum of thirty years. Monthly

payments of such Postponed Retirement Annuity will commence at the Participant's Postponed Retirement Date and will be payable thereafter for as long as he lives.

4.6 *Increased Benefits for Retired Participants.* Anything to the contrary herein notwithstanding, in the event there is an amendment to the Plan increasing the benefits thereof, said increased benefits will be paid and made available as of the effective date of the amendment to each and every retired Participant, so long as the Trustees first receive a written opinion from a qualified actuary that the payments of said increased benefits to retired Participants do not violate any rules or regulations of the Internal Revenue Service or adversely affect the tax-exempt status of the Trust Agreement and the Plan.

Article 5 Death Benefits

5.1 *Amount and Form of Death Benefit Before Normal Retirement Date.* If a Participant dies before his Normal Retirement Date, no benefits will be payable under the Plan, nor will any person be entitled to same.

5.2 *Amount and Form of Death Benefit After Normal Retirement Date (St. Louis Labor Health Institute).* The amount and form of benefit payable upon the death of a Participant who was in the employ of the St. Louis Labor Health Institute immediately prior to his Normal Retirement Date will be determined as follows:

(a) If the Participant dies after his Normal Retirement Date but while still in the employ of the Employer, his designated beneficiary will receive whatever pension benefits would have been payable to him during the sixty months next following his Normal Retirement Date and in the same manner and pursuant to the same schedule of benefits.

(b) If the Participant dies after receiving his first annuity payment, his designated beneficiary will receive whatever pension benefits would have been payable to him for the remainder, if any, of the sixty months period next following his Normal Retirement Date or Postponed Retirement Date and in the same manner and pursuant to the same schedule of benefits.

(c) If no beneficiary has been designated, benefits shall be paid to the Participant's surviving spouse or estate (in such order) as fully as if he, she, or it had been the designated beneficiary.

5.3 *Amount and Form of Death Benefit After Normal Retirement Date (Teamsters Local 688).* The amount and form of benefit payable upon the death of a Participant who was in the employ of Teamsters Local 688 immediately prior to his Normal Retirement Date will be determined as follows:

(a) If the Participant dies after his Normal Retirement Date while still in the employ of the Employer or after receiving his first annuity payment, his surviving spouse, if any, will receive monthly payments of an amount equal to $20, multiplied by the number of years of Credited Service completed by the Participant at his Normal Retirement Date or Postponed Retirement Date, up to a maximum of thirty years. Such monthly payments to the surviving spouse will commence on the first day of the month next following the date of the Participant's death and will be payable thereafter for as long as the surviving spouse lives.

(b) For the purposes of subparagraph (a), above, *surviving spouse* will mean one married to the Participant at the time of the Participant's death who was also the Participant's lawfully wedded spouse at the time the Participant first became a Participant under the Plan.

If the Participant was not married at the time he first became a Participant under the Plan, then in order to be eligible for benefits under this Article 5.3, the surviving spouse must be the spouse of the Participant's first lawful marriage contracted after becoming a Participant and must also be the Participant's lawfully wedded spouse on the date of the Participant's death.

Article 6 Total And Permanent Disability

6.1 *Conditions for Qualification for Disability Benefit.* If a Participant (1) is in the employ of the St. Louis Labor Health Institute, (2) has completed ten or more years of Credited Service, (3) incurs a Total and Permanent Disability, as defined in Article 6.3, and (4) becomes entitled to disability benefits payable under Title II of the Social Security Act (as evidenced by a Certificate of Social Insurance Award), he will be eligible for a disability benefit under the Plan in accordance with Article 6.2.

6.2 *Amount of Disability Benefit.* The disability benefit provided for by the Plan will consist of a disability income payable during the Total and Permanent Disability of the Participant (so long as it exists) in a monthly amount of $100 for Participants who are Employees immediately prior to their Total and Permanent Disability and $45 for Participants who are Part-Time Employees immediately prior to their Total and Permanent Disability.

The first monthly disability payment will be made on the first day of the month coinciding with or next following the date of receipt of due proof of Total and Permanent Disability by the Trustees, and it will include such amounts as are necessary to pay the disability benefit to the Participant retroactive to the date of the commencement of the Participant's Total and Permanent Disability.

6.3 *Definition of Total and Permanent Disability.* Disability will be deemed to be *Total and Permanent Disability* whenever the Participant is wholly disabled by a bodily injury or disease and will be permanently, continously and wholly prevented thereby from engaging in any occupation and performing any work for wage or profit. Evidence of such Total and Permanent Disability, as herein defined, must be certified in writing to the Employer by a reputable physician or surgeon selected by the Employer and licensed to practice medicine in the State of Missouri. Once given, the certification of said physician or surgeon will be binding on the Employer, the Participant and all other persons privy to their interest or affected by said determination.

Article 7 Special Limitations On Benefits

7.1 *When Article is Applicable.* The provisions of this Article 7 will take effect only if at any time prior to the ten-year period following the Effective Date Employer Contributions are discontinued or the Employer's full current costs have not been met. In this event, the amount of Employer Contributions which may be used to provide benefits for any Restricted Participant, as defined in Article 7.2, may not exceed that amount which would provide such Restricted Participant with the limited benefits described in Article 7.3.

7.2 *Definition of Restricted Participant.* For the purposes of this Article, a *Restricted Participant* is any Participant who, on the Effective Date, was one of the twenty-five highest paid participating Employees or Part-Time Employees of the Employer, and whose anticipated monthly annuity under the normal form was in excess of $125 per month.

7.3 *Definition of Limited Benefits.* For the purposes of this Article the words *limited benefits* mean the monthly annuity provided by Employer Contributions not in excess of the greater

of (a) $20,000 or (b) 20% of the first $50,000 of the Participant's average regular annual salary, multiplied by the number of years of coverage under the Plan.

7.4 *Application of Cancelled Reserves.* The reserves on all retirement annuities which are cancelled under this Article will be applied to provide additional annuities for the remaining Participants. The total amount to be so applied will be distributed proportionately among such Participants on a basis consistent with the provisions of Article 11.

7.5 *No Restriction on Payment While Plan is in Effect.* While the Plan is in full force and effect and full current costs are being met by the Employer, the foregoing conditions will not restrict the current payment of the full retirement annuities provided under the Plan to retired Participants.

7.6 *Restrictions may be Applied After Ten-Year Period.* In the event the full current costs of the Plan are not met at the end of the ten-year period described above, these restrictions will continue to apply until such time as the full current costs are first met.

Article 8 Funding Of Plan Benefits

8.1 *Group Annuity Contracts.* All benefits under the Plan will be payable under a group annuity contract entered into by the Trustees with the insurance carrier selected by the Trustees, or by any other arrangement authorized by the Trustees, in accordance with the Trust Agreement. Such insurance carrier must be a reputable carrier experienced in pension underwriting and authorized to do business in the State of Missouri. No person will have any claim for benefits against any Employer, the Trustees or the insurance carrier except as may be specifically set forth in the Plan or the group annuity contract issued by the insurance carrier.

8.2 *Amount of Contributions.* No Participant will be required to make any contributions to the Plan. In no event may any Employer Contributions revert to the Employer or be used for or diverted to any purpose other than for the exclusive benefit of Participants, their spouses or their beneficiaries in accordance with the terms of the Plan and for the payment of administration expenses of the Plan.

8.3 *Forfeitures.* Any forfeitures or dividends which arise under the Plan will be applied by the Trustees toward the cost of the benefits provided under the Plan.

Article 9 Administration

9.1 *Administration of the Plan.* The Trustees will be responsible for the administration of the Plan, and will make such rules and regulations consistent with the orderly administration of the Plan as may be deemed necessary, in keeping with the powers and duties prescribed for them under the Trust Agreement. The Trustees may employ such agents, accountants, actuaries, attorneys or other qualified persons as may be deemed necessary for the proper administration of the Plan, in keeping with the powers and duties prescribed for them under the Trust Agreement. The Trustees will provide for each Participant to receive either a copy of the Plan or a booklet setting forth in summary form a statement of the essential features of the Plan.

Decision of Trustees. Except where the power of determination is expressly reserved to the Employer or the Insurance Company, the Trustees will have full power and authority to determine all matters arising in the administration, interpretation and application of the Plan, and the determination of any such matter by the Trustees will be conclusive on all persons. In the event of a deadlock on the part of the Trustees in any matters, such deadlock shall be broken as provided in the Trust Agreement, and the decision shall be final and binding. Any rules and

regulations and any exercise of discretion or other action by the Trustees will be equitable and non-discriminatory and will be uniform in application as between Participants.

9.2 *Monthly Installments Less Than $15.* If the amount of any monthly installment payable under the Plan to any person under an annuity or other benefit is less than $15.00, the actuarial value of the annuity or other benefit may be paid to such person in a lump sum. Such payment will be in full settlement of all liability under the Plan to the Participant.

9.3 *Spendthrift Clause.* No Participant, annuitant or beneficiary has the right to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge any benefit or payment under the Plan. All benefit payments to Participants, if and when such payments shall become due, shall, except as to persons under legal disability, to paid to such Participants in person and shall not be grantable, transferable or otherwise assignable in anticipation of payment thereof, in whole or in part, by the voluntary or involuntary acts of any such Participants or by the operation of law, and shall not be liable or taken for any obligation of such Participants.

To the extent permitted by law, no benefit or payment under the Plan will be subject to any claim or process of law by any creditor of a Participant, annuitant or beneficiary.

9.4 *Jurisdiction.* The Plan is created and established in the State of Missouri. The Plan will be construed, administered and enforced according to the law of the State of Missouri, fairly, equitably and in accordance with the purposes of the Plan. All questions pertaining to the validity or construction of the Plan and the accounts and transactions of the parties shall be determined in accordance with the laws of the State of Missouri.

9.5 *No Effect on Continued Employment.* Nothing contained in the Plan may be construed as conferring any rights upon any person for a continuation of his employment, or as in any way

affecting such employment, nor may it be construed as limiting in any way the right of the Employer to terminate the employment of, or to retire, any Employee or Part-Time Employee.

9.6 *Personnel Data.* The Employer will provide the Trustees with such personnel data as is required to carry out the provisions of the Plan with respect to the Employees and Part-Time Employees of the Employer.

9.7 *Standard of Proof.* The Trustees have the right to require submission of all necessary information before any benefit is paid, including records of employment, proofs of dates of birth, disability or death, and evidence of existence. No benefit dependent in any way upon such information will be payable unless and until the information so required has been furnished. The Trustees shall be the sole judges of the standard of proof required in any case. Anything contained herein to the contrary notwithstanding, the information and data contained in Exhibit B of the Pension Contract shall be binding and conclusive on the Trustees.

9.8 *Applications and Misrepresentations.* All applications for benefits under the Plan, whether on account of retirement, death, or disability, must be made in writing in the form and manner prescribed by or satisfactory to the Trustees. Any misrepresentation by the applicant will constitute grounds for the denial, suspension or discontinuance of benefits, in whole or in part, for such applicant, or for the cancellation or recovery of benefit payments made in reliance thereon.

9.9 *Payment of Benefits under Legal Disability.* In case any benefit payments hereunder become payable to a person who is adjudicated incompetent or, by reason of mental or physical disability, in the opinion of the Trustees, who is unable to administer properly such payments, then the Trustees may direct that such benefits be paid out for the benefit of such person in such of the following ways as they think best, and the Trustees

shall have no obligation or duty to see that the funds are used or applied for the purpose or purposes for which paid:

(a) directly to any such person

(b) to the legally appointed guardian or conservator of such person

(c) to any spouse, parent, brother or sister of such person for his welfare, support and maintenance

(d) by the Trustees using such payments directly for the support maintenance and welfare of any such person.

9.10 *Re-employment.* A Participant who retires under the Plan and who becomes re-employed will forfeit all rights to pension benefits due on or after the first day of such employment and during the period of such employment. If the Participant again retires and reapplies for pension benefits, and is otherwise qualified, subsequent benefit payments will begin on the first day of the calendar month which is more than sixty days after his subsequent retirement date. The pension benefits of such Participant who is re-employed, as set forth in this Article, will in no event duplicate the benefits previously received or forfeited by him, or the right thereto, or result in any discriminatory increase of benefits to him or in his favor by virtue of his said re-employment, it being the clear intention of the Plan that in no event will there be a duplication of benefits for any Participant, whether re-employed as herein stated or otherwise.

9.11 *Retirement Benefits Withheld.* Any pension benefits which are withheld from a Participant as a result of the forfeiture of such benefits under Article 9.10 will be payable to the Trustees and will become part of the Pension Fund. For the purpose of determining such Participant's futher benefits, if any, after his death or resumption of retirement, a benefit paid to the Trustees under this Article will be deemed to be a benefit paid to the Participant.

9.12 *Illegality of Provision.* In case any provision of the Plan is held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining parts of the Plan, but the Plan will be construed and enforced as if said illegal and invalid provision had never been inserted in the Plan.

Article 10 Amendment Of Plan

10.1 *Trustees' Right to Amend Plan.* Subject to the terms and conditions of the Trust Agreement and any applicable law or regulations, the Trustees may at any time or times amend or modify the Plan, retroactively or otherwise, in any respect consistent with the intent of the Plan that at all times it will conform to the applicable requirements of the Labor Management Relations Act, 1947, as amended, and to the Internal Revenue Code, and that Employer Contributions will be deductible as an item of expense by the Employer for income tax purposes.

10.2 *Qualification of Plan.* It is intended that the Plan will constitute a qualified pension plan under the applicable provisions of the U.S. Internal Revenue Code as now in effect or hereafter amended. Any modification or amendment of the Plan may be made retroactively, if necessary or appropriate, to qualify or maintain the Plan as a plan meeting the requirements of the applicable provisions of the U.S. Internal Revenue Code, as now in effect or hereafter amended, or any other applicable provisions of the U.S. Federal tax laws, as now in effect or hereafter amended or adopted, and the regulations issued thereunder.

10.3 *Amendment in Conformity with Trust Agreement.* If the Trust Agreement is amended by the insertion, modification, or deletion of any provisions relating to or affecting the Plan, the Trustees, to the extent legally permissible and in conformity with the foregoing provisions of this Article 10, will amend the Plan to effectuate the intent of such amendment to the Trust Agreement.

10.4 *Deletion of a Class of Participants.* If the Plan is amended to provide that no further retirement annuities are to be provided for a class of Participants, then the rights of all parties with respect to the coverage of Participants in such class who, as of the date of such amendment, are not transferred to another class or classes of Participants not affected by such amendment or by a similar prior amendment will be the same as though the Plan had been terminated under Article 11 for all Participants.

10.5 *Limitation on Amendment.* In no event may any amendment be made to the Plan which:

(a) will cause any Plan funds to revert to the Employer; or

(b) will divest any Participant of any benefit credited to him under the Plan before the effective date of the amendment, except as the same may be required by the U.S. Internal Revenue Service as a condition of preserving the Trust's Federal tax exempt status.

(c) will cause or effect any discrimination in favor of officers or individuals whose principal duties consist of supervising the work of others, or highly compensated employees.

10.6 *Distribution of Copies.* If the Plan is amended, a copy of such amendment is to be furnished promptly to the Employer and the Insurance Company.

Article 11 Termination Of Plan

11.1 *Termination and Allocation of Funds.* It is expected that the Plan will be continued in effect indefinitely and that the Employer will continue to make such contributions under the Trust Agreement to the Pension Fund as are required to provide benefits under the Plan. However, if the Plan is terminated, or if at any time Employer Contributions are completely discontinued, any Employer Contributions, or funds attributable

thereto, not previously allocated for the benefit of retired Participants will be allocated so as to provide each Participant with the full amount of benefit which he has accrued under the Plan to the date of termination of the Plan or total discontinuance of Employer Contributions.

If the amount of Plan funds available is not sufficient to provide each Participant with the full amount of his accrued benefit, the Plan funds will be allocated to provide fully vested immediate or paid-up deferred retirement annuities for the Participants to the extend possible with the available funds and in the following order of priority:

(a) To provide immediate retirement benefits for Participants who have then attained their Normal Retirement Dates, but who have not actually retired, in an amount equal to, and under the same annuity form as, the monthly retirement annuity to which the Participant is entitled under Articles 4.4 or 4.5, as applicable.

(b) To provide immediate retirement benefits for Participants who are then receiving disability payments under Article 6, payable in an amount equal to the Participant's monthly disability payment for the remainder of the lifetime of the Participant.

(c) To provide paid-up deferred retirement benefits under the normal annuity form for any other Participants, in an amount equal to the Participant's accrued benefit as of the date the Plan is terminated.

Within each category, Plan funds will be allocated on a pro-rata basis so as to provide each Participant with such proportion of his accrued benefit as can be provided by the amount of Plan funds available. The amount of benefit which each such Participant will receive will be in the same ratio to the amount of his accrued benefit as the amount of Plan funds available bears

to the total amount which would be required to provide the full amount of accrued benefit for each such Participant.

The determination as to the amount of accrued benefit which can be provided for Participants under this Article 11.1 will be based on an actuarial study and report by a qualified actuary to be designated by the Trustees.

11.2 *Limitation of Benefits.* Except as provided by Article 11.5, in no event may a Participant receive a larger retirement annuity benefit under this Article 11 than the total amount which he has accured under the Plan to the date of termination of the Plan or total discontinuance of Employer Contributions.

11.3 *Termination Benefits Unaffected by Continued Employment.* Benefits, when determined as described above, will remain fixed regardless of any person's employment status thereafter.

11.4 *Form of Annuity.* If immediate retirement benefits are to be provided for a Participant, payments will commence on the first day of the month next following the date of termination of the Plan. If deferred retirement benefits are to be provided for a Participant, payments will commence on the Participant's Normal Retirement Date. For the purpose of determining a Participant's Normal Retirement Date under Article 3.1 or Article 3.2, as applicable, in the event of termination of the Plan each succeeding twelve-month period from the date of termination of the Plan shall be considered to be a year of Credited Service or participation in the Plan, as applicable, which meets the requirements of sub-paragraphs (b) and (c) thereof, and it will be assumed that twenty weeks' contributions have been paid to the Pension Fund on behalf of the Participant for each such year.

11.5 *Allocation of Remaining Balance.* If, after the provision of Article 11.1 have been applied, any balance remains in the Plan funds, such remaining balance will be allocated among all Participants then in the active employment of the Employer in

accordance with a non-discriminatory formula to be determined by the Trustees. Any such amount to be allocated to the Participant may be in cash or in the form of an annuity contract at the discretion of the Trustees. The determinations to be made under the provisons of this Article 11.5 will be based on an acturial study and report by a qualified actuary to be designated by the Trustees.

(As amended 1-1-71 by Am. #1)

EXHIBIT C

Schedule of Participant Contributions
(As referred to in Section 2.1 of Contract)

Scale of contributions payable under the Plan as of January 1, 1971 with respect to each active participant in the Plan:

As to St. Louis Labor Health Institute—

Full-time employees $14.00 per week per active participant

Part-time employees $ 8.00 per week per active participant

As to Teamsters Local 688—

Calendar year 1970 $22.00 per week per active participant

Calendar year 1971 $28.00 per week per active participant

Calendar year 1972 $34.00 per week per active participant

Calendar year 1973 $40.00 per week per active participant

(Substituted by Amendment No. 1, effective January 1, 1971)

APPENDIX D

Gibbons Depo Ex. No. 11 (8-21-76 P.C.H.)

September 28, 1971

Mr. Richard Kavner
Teamsters Loçal 688
300 South Grand Blvd.
St. Louis, Missouri 63103

Dear Dick:

Regarding your inquiry pertaining to that portion of the LHI - 688 Employees Retirement and Pension Program (break of service), the contract pertaining to that part of the Pension Program break of service reads as follows:

"Except as stated in (1) and (2) below, an Employee's or Part-Time Employee's Credit Service will be broken if the Employee or Part-Time Employee leaves the service of the Employer and the Related Employer for a period of at least fifty-two consecutive weeks.

(1) Credited Service will not be broken if the Employee or Part-Time Employee is on a leave of absence authorized in writing by the Employer or the Related Employer. All leaves of absence granted by the Employer to Employees and Part-Time Employees will be granted on a uniform and consistent basis uniformly and consistently applied with respect to all Employees and Part-Time Employees so that all Employees and Part-Time Employees will be treated in this respect on a non-discriminatory basis.

(2) Any Employee or Part-Time Employee who leaves the service of the Employer or the Related Employer to enter the armed forces of the United States of

America will be considered to be on leave of absence authorized by the Employer (just as effectively as if in writing and approved by the Employer) during the period of his service in such armed forces and during any period after his discharge from such armed forces in which his re-employment rights are guaranteed by law."

Our records show that the first meeting held for the purpose of discussing a possible Pension Program for LHI and 688 employees started September 30, 1968. You are aware of the many changes of individual employee names under eligibility that took place prior to the final list being submitted to IRS December 17, 1969 for approval. We fail to find on any of the lists prepared for the carrier underwriting the program the name of Edward Brown.

In further checking with the carriers' representative, and our actuary, it is their opinion that there would be no way of making any individual eligible under the minimum requirements for the Pension Program, unless, (a) he was employed at the time the program went into effect; (b) he conformed with the 20 years service; and (c) he had 2 years of payment under the program.

To change this formula, it would seriously jeopardize the position of the Fund and all eligible employees who qualify for pension benefits as outlined above. This also is the opinion of Stanley Rosenblum, Attorney representing the LHI-688 Employees Retirement and Pension Program.

I hope this information is what you request from us.

Sincerely,

Labor Management Consultants, Inc.

/s/ Tony Remshardt
President

TR/bp

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